Supreme Court, U. S.
FILED
DEC 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-984

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 433,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Ninth Circuit

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I
OPINIONS AND ORDERS BELOW

The Opinion of the Court of Appeals is reported at 600 F.2d 770 and appears as Appendix A. This Opinion granted enforcement to a Decision and Order of the National Labor Relations Board which is reported at 228 NLRB 1420 and appears as Appendix B. The Judgment of the court below appears as Appendix C.

II

JURISDICTION

The Opinion of the court was filed July 16, 1979. The Judgment was filed September 26, 1979. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

III

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act requires a finding of intent to discriminate on the basis of union participation or non-participation in order to sustain a violation of Section 8(b)(1)(A) or 8(b)(2)?

2. Whether the back pay proceedings of the Board's Rules may be used to identify alleged discriminatees where the Board has been unable to identify such discriminatees in the unfair labor practice proceeding?

3. Where evidence of an incident is offered and received as background information, may it become the basis for a substantive finding of a violation of the National Labor Relations Act?

IV

STATUTES INVOLVED

29 U.S.C. § 158(b)(1)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

29 U.S.C. § 158(b)(2) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

V

THIS PETITION SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES OF FEDERAL LAW REGULATING CONSTRUCTION INDUSTRY HIRING HALLS AND THE LITIGATION OF UNFAIR LABOR PRACTICES BEFORE THE NATIONAL LABOR RELATIONS BOARD

A. This Case Arises Out of a Board Proceeding Concerning the Operation of a Hiring Hall Pursuant to a Collective Bargaining Agreement Between Petitioner, Local 433 and Various Employers in the Los Angeles Area

The Regional Director of Region 21 issued an unfair labor practice complaint, alleging in general terms that Local 433 failed to operate "its hiring hall in accordance with the provisions of the collective-bargaining agreement . . . but has operated its hiring hall in an arbitrary, capricious and unfair manner." (C.R. 34)[1] The Complaint alleged that the referrals to certain named contractors had been in violation of the procedures set out in the collective bargaining agreement. The hearing before an Administrative Law Judge began on June 16, 1976 without any indication of the identity of individual dispatches claimed to be "unfair" or any identification of those individuals who were denied jobs to which they were otherwise entitled.

Testimony was received and subsequently the Administrative Law Judge issued his decision finding that there were seventy six referrals between May of 1974 and March of 1975 in violation of the referral procedures. Appropriate

[1]C.R. reflects the Clerk's Record on Appeal before the Ninth Circuit. T.R. denotes the Reporter's Transcript.

injunctive relief was ordered. In addition, the Administrative Law Judge ordered Local 433 to award back pay to the *unidentified* victims of the referrals found to be in violation of the agreement. Although expressing a reluctance to trigger any "extended, open ended litigation" with respect to back pay, the Administrative Law Judge ordered further hearings because the General Counsel of the Board "should have the opportunity to attempt [to identify the discriminatees] . . ." (App. p. B-75).

During the hearing, there was brief testimony from one ironworker, Gilbert Sims, regarding a physical confrontation with a business agent, Joe Ward. The parties to the proceeding and the Administrative Law Judge treated this testimony as "background" and to "shed light on the dispatch system . . ." (App. p. B-16) The General Counsel had not urged this incident as a violation before the Administrative Law Judge, however, it did so for the first time upon exceptions to the Board. Although the Board recognized that the incident had constituted "background", which had not been alleged in the Complaint, it found the incident as a substantive violation and ordered additional remedial relief.

B. Absent Evidence That the Backdooring Was Related to Union Participation or Non-Participation, the Ninth Circuit Per Se Rule Is Contrary to Sections 8(b)(1)(A) and 8(b)(2)

The process of "backdooring" described by the Administrative Law Judge involved referrals of ironworkers to various construction jobs without placing the job orders through the normal hiring hall process. This "backdooring"

did not bear any relationship to union participation or non-participation. Nor is there any evidence that linked the "backdooring" to any hostility directed towards any individual or group of individuals. This "backdooring" practice was found to be a violation solely because it circumvented the collective bargaining agreement's referral procedure.

Sections 8(b)(1)(A) and 8(b)(2) are meant to insulate a worker's job from actions related to membership or lack thereof in a labor organization.[2] To that extent, this Court has placed its *imprimatur* upon union-operated hiring halls, even though such hiring halls tend naturally to encourage union membership and loyalty. *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 675 (1961). The Act outlawed only "such discrimination as encourages or discourages membership in a labor organization . . .". *Id.* at 675. This was an expression of the principle first enunciated in *Radio Officers' Union v. Labor Board*, 347 U.S. 17, 40 (1954) in which this Court limited the impact of the Act to those circumstances where the parties interfered with the right of employees "to join unions, be good, bad or indifferent members, or abstain from joining any union."

Within this framework, the Ninth Circuit, in agreement with the Labor Board, has taken the extreme position that arbitrary action whether related to union membership or not creates an irrebuttable presumption of union discrimination. In the words of the court below, arbitrary conduct "gives notice that [the union's] favor must be curried,

[2]Section 8(b)(2) permits discharge where an employee fails to comply with lawful Union security clause.

thereby encouraging membership and unquestioning adherence to [the union's] policies." (App. p. A-11)[3]

The Court of Appeals for the District of Columbia Circuit has recognized the disarray which the courts find themselves in with respect to whether "a discrimination based entirely upon causes not related to union membership or activity is violative of the statute." *Lummus Company v. NLRB*, 339 F.2d 728, 733 (D.C. Cir. 1964). The Second Circuit has rejected the Ninth Circuit's theory. See *NLRB v. Miranda Fuel Co. Inc.*, 326 F.2d 172 (2nd Cir. 1963).

The Labor Board itself has expressed confusion whether it must find intent to discriminate based upon union membership or whether it may presume that union membership is encouraged or discouraged by arbitrary conduct. See *International Union of Operating Engineers Local 18*, 204 NLRB 681 at 681-682 (1973), *remanded*, 496 F.2d 1308 (6th Cir. 1974), *reaffirmed*, 220 NLRB 147 (1975), *enforcement denied*, 555 F.2d 552 (6th Cir. 1977); *Millwrights Local Union 1102*, 144 NLRB 798, 800 (1963); *Houston Typographical Union No. 87*, 145 NLRB 1657 (1964). But cf. *United Rubber Workers No. 12 v. NLRB*, 368 F.2d 12, 20 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[3]This extreme position was first expressed by this Circuit in *Kling v. NLRB*, 503 F.2d 1044, 1046 (9th Cir. 1975). In other cases, however, where the Ninth Circuit has expressed its opinion, the arbitrary conduct was related to union membership or participation. See, for example, *Laborers and Hod Carriers Local No. 341 v. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977). The case before this Court is the first one, where the Board below made no finding that the union's actions were related to or bore any relationship to union participation.

A union's conduct may be in violation of a collective bargaining agreement without being related to union membership or activity. Likewise, union conduct which may be consistent with the collective bargaining agreement may discourage or encourage union membership because of the effects upon bargaining union members. This Court, therefore, should grant this petition to resolve the issue raised as to whether Congress has aimed its sanctions at the specific discriminatory practices or whether "the Board cannot go farther and establish a broader more persuasive regulatory scheme." *Local 357, Teamsters v. NLRB, supra* 365 U.S. at 675.

C. Where The Board Has Conceded Its Inability to Identify Discriminatees, It Is Improper to Initiate Back Pay Hearings to Litigate Any Award of Back Pay

Although seventy-six individuals were identified who were referred to jobs in violation of the contractual provisions, no discriminatee who was denied a job or job opportunity was ever identified. (App. p. B-73). The Ninth Circuit agreed that the General Counsel of the Board should have the opportunity to establish the identity of any individual discriminatee who would have been referred to a job in question but for the contractual violation of Local 433. (App. p. A-17).

As, however, the Administrative Law Judge recognized, the Board is reluctant to encourage such open-ended back pay hearings for unidentified discriminatees. See, for example, *International Longshoreman's and Warehouseman's Union Local No. 13,* 183 NLRB 221, *remanded,* 80 LRRM 3213 (9th Cir. 1972), *order reaffirmed,* 210 NLRB

952 (1974); and *Local 851, International Longshoreman's Association,* 194 NLRB 1027 (1972); and *Standard Fruit and Steamship Co.,* 211 NLRB 121 (1974); and *Pay n'Save,* 210 NLRB 311, 328 (1974). The Ninth Circuit approved an unlimited attempt by the General Counsel to identify the discriminatees, even though the General Counsel had conceded during the prior hearing, that it could not identify the discriminatees within the context of the operation of the union's hiring hall.[4]

The Ninth Circuit's rationalization permitting further attempts by the General Counsel to identify discriminatees, rests upon a misunderstanding of the compliance procedure adopted by the Board and approved by this Court. See *J.H. Rutter-Rex Manufacturing Corp.,* 396 U.S. 258 (1969); and 29 C.F.R. § 102.52-.53.

Those provisions are not designed to permit the General Counsel to litigate issues decided adversely. Since the Board and the General Counsel concede that it is impossible to identify alleged discriminatees, it is not only useless but punitive to require further back pay proceedings.

D. Where Evidence Is Received as Background Material, It Cannot Become the Basis for a Substantive Finding of a Violation of the National Labor Relations Act

During the course of the proceeding, Gilbert Sims, an ironworker, testified with respect to a physical altercation with Business Agent, Joe Ward, in the hiring hall. The matter was treated, by the parties, as "background". It was not urged by the General Counsel at the hearing as a

[4]See T.R. 1012:22-25 and 80:114-16.

violation of the Act, nor before the Administrative Law Judge. Moreover, it was adduced, apparently, to illustrate the consciousness of the Business Agents as to the "backdooring."

For the first time before the Board, the General Counsel urged this incident as a violation of the Act, even though the unfair labor practice complaint had been limited solely to the referral procedure. The Administrative Law Judge had recognized this incident as it "shed light on the dispatch system and put those specific instances of backdooring into perspective." (App. p. B-16) In its decision, the Board agreed that the evidence had been received as "background", but found that the incident warranted substantive remedial relief and made a finding with respect to the alleged assault.

Having failed to be put on notice that the incident would be urged as a separate violation, Local 433 did not seek to adduce rebuttal witnesses or litigate the merits of the incident. As the Court below noted, where issues are properly litigated in unfair labor practice proceedings, violations may be found even though those incidents are not precisely encompassed within the meaning of the unfair labor practice complaint. Here, however, the evidence fell squarely within the Board's principle that evidence adduced as background material may not become the foundation for a subsequent violation. Where "evidence relating to [an incident] was introduced solely as background evidence to shed light on the Respondent's motives . . ." it may not become the basis for an unfair labor practice finding. *Waukesha Sales and Service, Inc.,* 137 NLRB

460 (1962).[5] The Court below, while recognizing the incident was not specifically within the boundary of the complaint, held that it was sufficiently encompassed within the claim of unlawful referrals to be fairly encompassed within the complaint. That, however, ignores the Board's explicit finding (App. p. B-2), that the incident was offered solely for "background" information; not for the substantive violation "[I]t would derogate elemental concepts of procedural due process to grant enforcement to such a finding." *NLRB v. H. E. Fletcher,* 298 F.2d 594, 600 (1st Cir. 1962).

The importance of this issue concerns not only the violation of due process, but the necessity to set boundaries upon the Board's eagerness to find violations where issues are not litigated or pleaded. In particular, the Board must be restrained from proceeding where matters are offered and accepted solely for background relevance, and not for any substantive violations of the Act.

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[5]See also *Boyle's Famous Corned Beef Company v. NLRB,* 400 F.2d 154 (8th Cir. 1968); *NLRB v. Fred H. Johnson,* 322 F.2d 216 (6th Cir. 1963); *Montgomery Ward & Co. v. NLRB,* 385 F.2d 760 (7th Cir. 1967); and *NLRB v. Tamper, Inc.,* 522 F.2d 781 (4th Cir. 1975).

CONCLUSION

For the reasons suggested above, this petition for writ of certiorari should be granted.

Dated, San Francisco, California, December 21, 1979.

Respectfully submitted,
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(Appendices follow)

Appendices

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 77-2653

National Labor Relations Board,
Petitioner,

vs.

International Association of Bridge, Structural and Ornamental Iron Workers Local 433,
Respondent.

[Filed Jul. 16, 1979]

On Application for Enforcement
of an Order of the
National Labor Relations Board

OPINION

Before: WALLACE and TANG, Circuit Judges, and WHELAN*, District Judge

TANG, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order against the respondent International Association of Bridge, Structural and Ornamental Iron Workers, Local 433. The order directs that the Union

*The Honorable Francis C. Whelan, Senior District Judge for the Central District of California, sitting by designation.

cease and desist from operating its exclusive hiring hall in disregard of its collective bargaining agreement and from engaging in threats and acts of violence against employees who protest against the manner in which the hall is run. It also directs that the Union "make whole" those persons who were unlawfully refused dispatch. The Union, raising mostly procedural objections, argues against enforcement. We order enforcement.

After Waldo F. Kusterns, an individual, charged that the Union was engaging in unfair labor practices, the Board issued a complaint against the Union alleging that the hiring hall practices of the Union violated §§ 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(A) and 158(b)(2) (1970).[1] The complaint was heard before an administrative law judge (ALJ), whose findings of fact are virtually undisputed by the Union. We summarize these findings as follows.

The Union has collective bargaining agreements with a number of multi-employer associations and individual employers who hire ironworkers. The contract provides that the hiring of ironworkers who are employed by the contracting employers is to be done pursuant to § 5 of the contract.

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[1]Section 8(b)(1)(A) 29 U.S.C. § 158(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights guaranteed in § 7 of the Act. Under § 8(b)(2), 29 U.S.C. § 158 (b)(2), it is an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of § 8(a)(3), 29 U.S.C. § 158(a)(3). Section 8(a)(3) prohibits an employer from discouraging or encouraging union membership by discrimination in regard to hire, tenure, or terms and conditions of employment.

Section 5 allows an employer to employ, without resort to the hiring hall, a minimum number of "key employees". Additionally, the employers may directly employ "regular" employees, i.e., employees who worked 50% of their working time during the past 12 months for the employer. All other employees must be hired through the union's exclusive hiring hall.

When the employer hires through the hall, it may do so in two ways. It may hire employees "by name"; in such cases, the named employees may be in the ratio of three for every five employees hired, without regard to their position on the registration lists. All other journeymen required by the employers are furnished by, and referred through, the hiring office of the Union on an "open order" basis.

The contract specifies an orderly procedure for referring employees who are requested on an open order basis. First, the contract defines five categories of applicants for employment, assigning the highest priority to workers with the most experience in the trade and in the area. Each worker seeking employment through the hall must sign the "out of work" list for his priority group. After he does so, the business agent who is in charge of the hall at the time gives the worker an out-of-work number. Every Monday there is a general roll call of the out-of-work list, and applicants on the list who answer the roll call are given new out-of-work numbers based on the number of dispatches made the previous week. As inronworkers with the lowest numbers are dispatched, applicants who appear at the hiring hall move down on the list and receive lower numbers. Thus, those on the out-of-work list

who come to the hall and are unemployed the longest should have the lowest numbers while new applicants (such as those returning from jobs) should have the highest numbers.

When an employer who is bound by the contract needs ironworkers from the hiring hall, he notifies a Union agent of his needs and an order is placed for those workers. Sometimes the employer specifically states what types of skills are needed; at other times the agent knows from experience what skills are needed and makes a judgment about the skills to be required.

After receiving the order, the Union business agent in charge of the hall at the time calls out the order on a public address system in the hall. He specifies the name of the employer and the type of work that is to be done. The calls are made between 8 and 10:30 A.M. and the applicant must be in the hall when the call is made. Often there are as many as 300 applicants on the out-of-work list that are present in the hall when the calls are made. Anyone with an out-of-work number can bid on a job and the bidding worker with the lowest number receives the job.[2] The worker is then given a referral slip to the job signed by the business agent in charge and reports to work.

The ALJ found 76 specific instances during a ten month period in which the Union dispatched employees without adhering to the referral procedure. The term "backdoor-ing" is used to describe the situation when the Union makes

[2]For a number of reasons, an applicant with the lowest number may decide not to bid on a certain job. He may believe that he lacks the skills to do the particular job, that the job requires too much traveling, or that he wants a job of longer duration.

a job referral in a manner that bypasses the prescribed referral procedure.

In his findings, the ALJ elaborated on each instance of backdoor referrals. The backdooring fell into three categories. First, the Union dispatched individuals who were not eligible for dispatch because they were not on the out-of-work list. Second, the Union filled open orders by announcing calls "by name", thus preventing applicants on the out-of-work lists from bidding on these jobs. Third, the Union dispatched employees after receiving open orders without announcing the orders at the hall, thereby bypassing the entire referral procedure. In these situations, the Union gave employees referral slips at places outside the hiring hall.

The Union's business agents were quite open with regard to their practice of backdooring employees. On numerous occasions, some of them engaged in threats and violence to protect that practice.[3]

[3]The Board summarized its findings with respect to threats and acts of violence as follows:

> In early August 1974 Business Agent Ware acknowledged to Johnson that he (Ward) was backdooring employees when he said to Johnson, "you found out I was going to backdoor the job, didn't you?" On January 26, 1976 Ward told a number of employees, "In no way will I send anybody back to a job that's suing the Union." On September 25, 1975, Respondent's president and business agent, Rogers, violently assaulted Business Agent Kenney because Kenney had dispatched two men in Rogers' territory. Kenney was hospitalized with serious injuries. On December 11, 1974 Rogers replaced Cunningham with Morrison as steward on the Blount job because Cunningham refused to help Rogers in circumventing the hiring hall procedure. On February 13, 1975 when Zink questioned Business Agent Ward about a referral that Zink thought improper, Ward threatened to pound Zink's head in the pavement. On February 19, 1975 when Sims spoke about Respondent's backdooring of employees, Business Agent Ward assaulted Sims

The ALJ found that the Union's circumvention of the referral procedure was not isolated or keyed to emergency situations. Instead, they were so "massive" in scale as to undermine the procedure and "substitute the business agents' clandestine desires for the objective criteria set forth in the contract."

The ALJ concluded:

> Considering the statements and actions of Respondent's business agents, together with the 76 specific incidents of backdooring documented by the General Counsel, it is apparent that Respondent's business agents divided Respondent's jurisdiction into fiefdoms from which they dispensed patronage. Some of the business agents engaged in violence and threats of violence to enforce their practice of backdooring employees. The actions of the business agents were such as to give applicants for employment a reasonable basis for believing that access to employment depended on securing the good will of the business agents rather than on the objective criteria of the hiring hall.

The ALJ determined that the Union breached its duty of fair representation by its backdooring practices, and therefore, it breached §§ 8(b)(1)(A) and 8(b)(2) of the Act. It recommended that the Union be ordered to operate its hiring hall in accordance with the collective bargaining agreement. It also recommended that the Union be ordered to make whole the workers injured by the Union's

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and pushed him to the floor. Sims was seriously injured. On March 24, 1976 Respondent's executive board member Duke and two other individuals at the hall threatened to injure or kill Sims. Duke said that they had to get rid of all the s-o-b's and the best thing to do would be to shoot Sims and the rest of the NLRB witnesses. Respondent's Business Agent Wagner listened to the threats with a smile on his face and said nothing.

referral practices. Although the individual discriminatees were not identified at the hearing, the ALJ believed that the General Counsel should be allowed to prove the identity of the discriminatees at a backpay proceeding.

Both parties filed exceptions.[4] With one modification, the Board adopted the order and findings of the ALJ. 228 N.L.R.B. 1420 (1977).

The Board found that

> (a)lthough the threats and the act of violence were not specifically alleged in the complaint to violate the Act, they are closely related to and indicative of the manner in which the hiring hall was operated and, therefore, fall within the general allegation of the complaint that Respondent violated the Act by operating its hiring hall in an arbitrary, capricious, and unfair manner.

Id. As a result, it amended the order to include a violation of § 8(1)(A) for the threats and violence in which the Union engaged. The Board now petitions for enforcement.

By its silence, the Union concedes that substantial evidence supports the Board's findings that the Union circumvented hiring hall procedures specified in the collective bargaining agreement and engaged in threats and acts of violence against workers who objected to these practices. The Union, however, objects to the legal significance of these findings and raises a number of procedural issues. Specifically, the Union contends that (1) the findings of the Board concerning the acts of violence and threats were neither alleged nor litigated and therefore cannot be the

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[4]The General Counsel excepted to the Administrative Law Judge's failure to find eight other illegal referrals.

basis for a violation of the National Labor Relations Act; (2) the Board violated due process when it failed to inform the Union in the course of the hearing of the names of the illegal referrals; (3) absent a finding of discriminatory motive or intent, there is no violation of § 8(b)(1)(A) or 8(b)(2); (4) where no discriminatees are identified at the hearing, there may be no post-hearing proceeding at which the discriminatees may be identified; and (5) it was denied due process when a settlement agreement was set aside.

I

Failure to Allege Threats and Acts of Violence in Complaint

The Board found that the Union violated § 8(b)(1)(A) by engaging in threats and acts of violence against workers opposing the Union's hiring hall practices. The Union argues that it was denied due process because these acts were not specifically alleged in the Board's complaint.

We cannot agree. The Board may properly find an unfair labor practice when the issue has been fully litigated even though not specifically pleaded in the complaint. *E.g., Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978); *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1131 (9th Cir. 1978); *NLRB v. Klaue*, 523 F.2d 410, 414-15 (9th Cir. 1975). The Board may either render a decision upon the issues actually tried or order an amendment to conform with the proof. *Alexander Dawson, Inc.*, 586 F.2d at 1304; *Frito Co. v. NLRB*, 330 F.2d 458, 465 (9th Cir. 1964).

It is apparent that the issue of threats and violence were fully and fairly litigated. The record is replete with evidence documenting the occurrences of these acts. For the most part, this evidence was corroborated and uncontradicted. Although the Union contends that ALJ treated the incidents only as background, the ALJ in fact devoted two full pages to the incidents of violence, referencing his discussion with numerous citations to the evidentiary record. Furthermore, the Union did not move for a bill of particulars, did not object to the introduction of the evidence or move for a continuance, and cross-examined the relevant witnesses.

In any event, the Board's position that the acts and threats of violence were within the general language of the complaint is reasonable. These acts were as much a part of the unfair operation of the hiring hall as the improper referral practices.

II

Method of Proving Illegal Referrals

The Union argues that it was denied due process because the complaint did not specifically allege the identity of the persons improperly referred, and because the Union did not know until the last day of trial the names of the individuals who received an illegal referral.

Again, it was not necessary that the Board amend its complaint to include the identity of each illegal referral. The identities of those persons was fully litigated, and as the Board points out, the Union never filed a bill of particulars or sought additional information on this matter,

but answered the complaint and amendments to the complaint without raising any due process issues.

Moreover, the general procedure employed by the General Counsel for identifying the illegal referrals was reasonable. The General Counsel first called the employer witnesses to the stand to support the admission of lists of all employees hired for a particular job. Next, the persons who did the hiring for the employer testified as to the method (e.g., "open-order" or "by name") by which the particular employees were hired. The charging party, Kusterns, who had compiled a list of the dispatches made during the period in which the practices occurred, then testified for each day of the period how many calls were made and which company made them. At the close of this evidence, the general counsel collated the results in an exhibit that identified which persons were improperly referred.

Gixen the number of violations to be proved, the Board's procedure of proof was an orderly method of identifying the illegal referrals. The Union's characterization of the exhibit as "evidence" first introduced at the "end of the hearing" is somewhat misleading. The exhibit introduced by the General Counsel was merely a culmination of the testimony and exhibits that the Union had an ample opportunity to examine during the course of the hearing. It was introduced at the end of the hearing only because the Union chose not to present its own witnesses or move for a continuation of the hearing.

III

Violations of the Act

The only real substantive issue raised by the Union is whether the practice of illegal referrals constitutes a violation of §§ 8(b)(1)(A) and 8(b)(2). The Union contends that there can be no violation of the sections without a finding that the Union had a discriminatory motive or intent. According to the Union, "the facts can best be described as a granting of certain referral preferences without any suggestion that those preferences were granted because of union activity or lack thereof."

Even though the Board did not make findings that the illegal referrals were motivated by an intent to encourage Union membership, we have no difficulty in concluding the illegal referrals violated the National Labor Relations Act. On a number of previous occasions, we have held that it is an unfair labor practice in violation of §§ 8(b)(1)(A) and 8(b)(2) for a bargaining representative to act in an unreasonable, arbitrary, or invidious manner in regard to an employee's employment status. *Kling v. NLRB*, 503 F.2d 1044, 1046 (9th Cir. 1975). *See, e.g., NLRB v. Bricklayers Local No. 7*, 563 F.2d 977 (9th Cir. 1977). By wielding its power arbitrarily, the Union gives notice that its favor must be curried, thereby encouraging membership and unquestioned adherence to its policies. *Laborers and Hod Carriers Local No. 341 v. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977). No specific intent to discriminate on the basis of union membership need be shown; if the foreseeable result of discrimination is the encouragement of union membership, it must be supported by a legitimate purpose. *Id.* The natural consequence of referral preferences is to

encourage membership. *NLRB v. International Longshoremen's Union, Local 13*, 549 F.2d 1346, 1353 (9th Cir.), *cert. denied*, 434 U.S. 922 (1977).

The Union's collective bargaining agreement contained an explicit and unambiguous procedure governing the dispatch of job applicants.[5] The Board's uncontested findings showed that the Union's business agents made 76 referrals in violation of the terms of the agreement. These violations were not isolated. Rather, they were part of a systematic and continuous pattern of abuse in which Union business agents divided the Union's jurisdiction into "fiefdoms from which they dispensed patronage", openly backdooring referrals in violation of the agreement. The applicants who objected to the practice were faced with threats and acts of violence. The Union offered no reasons, legitimate or otherwise, to justify its practices. In these circumstances we conclude that the Union's arbitrary display of power violated §§ 8(b)(1)(A) and 8(b)(2) of the Act. *See Laborers and Hod Carriers Local No. 341*, 564 F.2d at 839-40. As the Board found, the natural and foreseeable consequences of a system by which the Union's agents arbitrarily dispensed their patronage was to encourage loyalty of the job applicants to the Union and its agents. *See International Longshoremen's Union Local 13*, 549 F.2d at 1353.

[5]The Board has taken the position that where a referral under an exclusive hiring hall agreement is conditioned upon clear and unambiguous standards, the refusal to employ an employee who qualifies for referral, without more, suffices to establish a prima facie violation of §§ 8(b)(1)(A) and 8(b)(2). In such cases, discriminatory motivation is presumed. International Brotherhood of Electrical Workers, Local 592, 223 NLRB 899, 901 (1976).

IV

Backpay

The General Counsel did not introduce evidence of the identity of the individual discriminatees at the hearing. The Board held that, although the discriminatees were as yet unknown, the matter of identifying the discriminatees and computing the amount of backpay owed them should be reserved for a post-enforcement compliance proceeding. The Union contends that the backpay award was improper, because the individual discriminatees cannot possible be identified, and even if they could, the litigation of the matter is inappropriate at the compliance stage of the proceedings.

The remedial power of the Board under § 10(e), 29 U.S.C. § 160(c), is a broad discretionary one, subject only to limited judicial review. *NLRB v. J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 260 (1969); *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964). An award of backpay is within the Board's remedial power; such an award is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. *J. H. Rutter-Rex Manufacturing Corp.*, 396 U.S. at 260. *See Golden State Bottling Corp. v. NLRB*, 414 U.S. 168, 188 (1974). When the Board, in the exercise of its informed discretion makes a backpay order, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act. *J. H. Rutter-Rex Manufacturing Corp.*, 396 U.S. at 263; *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953).

In computing backpay claims, the Board has typically taken a two-step approach. *See Vapor Blast Independent Shopworkers Association v. Simon,* 305 F.2d 717, 719 n.3 (7th Cir. 1962). The determination whether an unfair labor practice has occurred and whether backpay should be ordered is determined at the first stage. After enforcement has been granted, the specifics of compliance are determined at the second stage. This two-step approach has been approved by the Supreme Court, *see J. H. Rutter-Rex Manufacturing Corp.,* 396 U.S. at 260; *NLRB v. Deena Artware,* 361 U.S. 398, 411 (1960) (Frankfurter, J., concurring), and by this court. *See Polynesian Cultural Center, Inc. v. NLRB,* 582 F.2d 467 (9th Cir. 1978).

The Union contends, however, that, the determination of the identity of the discriminatees would require the "relitigation" of substantive issues, and therefore, this issue cannot be left for resolution at the compliance stage. We disagree. Although the identification of the individual discriminatees may require more litigation than is typical for backpay proceedings, we think that the Board acted in its discretion in reserving the issue until after enforcement.

Often the only issue for resolution at a compliance proceeding following a backpay order is the computation of the amount to be awarded. *See, e.g., NLRB v. Teamsters Hawaii Local 996,* 313 F.2d 655, 659 (9th Cir. 1963). However, the Board on numerous occasions has reserved the determination of complex factual issues for the compliance proceedings, a practice that the Courts of Appeals have approved. *See Great Chinese American Sewing Co. v. NLRB,* 578 F.2d 251, 255-56 (9th Cir. 1978) (questions

relating to amount of backpay, including whether employees made reasonable attempts to secure employment and whether their employment would have ceased for independent reasons, may be explored in compliance proceedings); *NLRB v. Globe Manufacturing Co.,* 580 F.2d 18 (1st Cir. 1978) (whether employee would have been recalled for work had he been properly considered and whether he was physically able to return to work left for compliance proceedings); *NLRB v. Eagle Material Handling, Inc.,* 558 F.2d 160, 171 (3d Cir. 1977) (whether reinstatement had been refused to striking employee or whether offer of reinstatement was unconditional are matters to be determined at compliance state); *Chemvet Laboratories v. NLRB,* 497 F.2d 445, 453 (8th Cir. 1974) (determination of the amount of overtime an employee might have worked but for illegal discharge is best left to compliance stage for resolution); *Trico Products Corp. v. NLRB,* 489 F.2d 347, 353-54 (2d Cir. 1973) (reserving the determination of when the employees would have been laid off for valid economic reasons for the compliance proceedings); *Rogers Manufacturing Co. v. NLRB,* 486 F.2d 644, 649 (6th Cir. 1973) (the determination of which of fourteen strikers is not entitled to reinstatement left to compliance proceedings); *NLRB v. McMahon,* 428 F.2d 1213 (9th Cir. 1970) (whether employee who was unlawfully interrogated and threatened is entitled to backpay may be considered during compliance stage); *NLRB v. Dazzo Products, Inc.,* 358 F.2d 136, 138 (2d Cir. 1966) (employer's precise duties as to reinstatement of and backpay for temporary employee to be resolved in compliance proceedings); *Majestic Molded Products, Inc. v.*

NLRB, 330 F.2d 603, 607-08 (2nd Cir. 1964) (whether laid-off employees were unqualified to work for affiliated employer can be shown in compliance proceedings).

These cases demonstrate the significant degree of discretion the courts have accorded the Board in allowing it to administer the enforcement of a backpay order in compliance proceedings. The fact that backpay must be computed for a sizeable number of discriminatees is not a persuasive argument against this approach. Because the determination of whether unfair labor practices have occurred is itself subject to judicial review, there is always a substantial risk that extensive proceedings to determine the amount of liability may be rendered superfluous by a reversal of the underlying violation. *Deena Artware,* 361 U.S. at 411 (Frankfurter, J., concurring). We think that leaving the identification of the discriminatees and the backpay due them to the compliance stage of the proceedings represents an orderly and efficient means for processing backpay orders in this kind of case.[6]

The Union contends that it is futile to allow the determination of the issues at a compliance proceeding because "no individual discriminatee can ever be identified." We do not share the Union's pessimism. The backpay obligation is limited to remedying the 76 particular incidents of backdooring found by the Board. The Union's out-of-work list

[6]On previous occasions, the Board has reserved the identification of the discriminatees for the compliance proceedings. *See, e.g.,* Wayne Electric Co., 226 NLRB 409 (1976); International Brotherhood of Boilermakers Local 101, 206 NLRB 30 (1973). Only when the record fails to show that applicants other than the charged party were discriminated against has the Board refused to reserve this determination. *See* Local 851, International Longshoreman's Association, 194 NLRB 1027 (1972). This is not the case here.

will identify the applicants who were eligible for referral when the Union backdoored these jobs. The General Counsel will then have to show that the individuals were in the hiring hall when the call was made and would have met the criteria for dispatch that were set forth in the contract. As the Board acknowledged, the General Counsel may be unable to identify which employees would have filled the jobs had the Union followed the procedures in the contract. We agreed with the Board that the General Counsel should be given the opportunity to try.

We can perceive no unfairness to the Union by affording the General Counsel this opportunity. The Union will be given an opportunity to contest the claims for backpay at the compliance proceeding, see, *e.g., NLRB v. Globe Manufacturing Co.,* 580 F.2d 18 (1st Cir. 1978); *Zim's Foodliner, Inc. v. NLRB,* 495 F.2d 1131, 1144 (7th Cir. 1974). Further, the Union may seek this court's review of the Board's determination. *See Polynesian Cultural Center, Inc.,* 582 F.2d at 476.

In short, we do not think that the difficulties that the General Counsel may have in identifying discriminatees makes an award of backpay any less appropriate. Such a matter merely affects the scope of the remedy and not the nature of the violation. *See Standard Fruit and Steamship Co.,* 211 NLRB 121 (1974). Where, as here, specific instances of discrimination have been proven, an award of backpay is necessary to rectify the presumptive harm that has been caused. Given that violations of the Act have been proved and enforcement of the order is warranted, we need not speculate on whether the General Counsel will be

able to prove the identity of all the discriminatees. The policies of the Act are effectuated by giving the General Counsel the opportunity to do so.

IV

Withdrawn Settlement

In July 1975 the Regional Office proposed a settlement, which the Union accepted, that provided for a cease and desist order and back pay for three individuals. In November 1975 the acting General Counsel disapproved the settlement. The Union contends that without "adequate explaination (sic) from the Board as to why the settlement was set aside and the matter forced to trial, the denial of due process is evident."

This argument has no merit. The proposed settlement included a stipulation that specifically required the approval of the General Counsel. The General Counsel apparently rejected the settlement because the charging party objected to the fact that it provided backpay to only three individuals despite the allegation that numerous ironworkers had been injured. In light of the Board's subsequent findings and our holding here, the decision to reject the settlement was clearly reasonable. Furthermore, the rejection of the settlement caused no substantial delay in the proceedings. The General Counsel returned the case for further investigation in November 1975, only four months after the Regional Office had submitted the settlement for approval. Although the hearing was not commenced until June 1976, most of this delay was due to the Union's lack of cooperation in the Regional Office's continuing investigation. As the Union's counsel admitted at the hearing, "I do

not seek to place on the shoulders of the Board or the General Counsel's office the responsibility for any postponements after December of 1975."

Even if the Board was to blame for this delay, the Union's contention is groundless. The Union has not shown, and we cannot find, any prejudice to the Union resulting from the delay.

ENFORCEMENT GRANTED

Appendix B

United States of America
Before the National Labor Relations Board

International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.) and Waldo F. Kusterns, an Individual	Case 21—CB—5081

DECISION AND ORDER

On December 29, 1976, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and Respondent filed a brief in response to the cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusion of the Administrative Law Judge as modified herein, and to adopt his recommended Order, as modified.

In a background discussion of how Respondent ran its hiring hall, the Administrative Law Judge found that Respondent, through its agents, engaged in threats and acts of violence against applicants for protesting violations of the contractual hiring hall procedures. On February 13, 1975, Lester Zink questioned Business Agent Ward about a referral. After a short discussion, Ward called Zink "a trouble-making son-of-a-bitch" and threatened to pound his head in the pavement. On February 19, 1975, Gilbert C. Sims had a conversation with Business Agent Ward about the hiring hall. Sims said that if unethical practices continued, someone was going to sue the Union. Ward grabbed Sims by the arms, cursed at him, shoved him backwards, told him to get out of the hall and stay out, and said "you're suing the Local and don't come back." Ward pushed Sims to the floor, and Sims injured his back. Sims called the police, and Ward was arrested. On March 24, 1976, Sims was approached by three ironworkers, including a member of Respondent's executive board. One said he would take Sims out, if Sims were 20 years younger, and work him over and would grind Sims up, put him in a rendering plant, and do away with him. Executive Board Member Dwayne Duke said "that they had to get rid of all those s-o-b's and the best thing to do would be to shoot Sims and the rest of the NLRB witnesses." Business Agent Thomas Wagner, who was in charge of the hall at the time, listened to the remarks with a smile on his face and said nothing. As found by the Administrative Law Judge, whether or not Duke was an agent of Respondent, Wagner acquiesced in those threats through his silence.

Although the threats and the act of violence were not specifically alleged in the complaint to violate the Act, they are closely related to and indicative of the manner in which the hiring hall was operated and, therefore, fall within the general allegation of the complaint that Respondent violated the Act by operating its hiring hall in an arbitrary, capricious, and unfair manner. For the above reasons, we find that Respondent, by engaging in the threats and act of violence, has restrained and coerced Lester Zink and Gilbert S. Sims in the exercise of their protected rights and has thereby violated Section 8(b)(1)(A) of the Act. We shall accordingly amend the order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, its officers, agents, and representatives, shall take the action set forth in said recommended Order as modified herein:

1. Add the following as paragraph 1(b) of the recommended Order and reletter the remaining paragraphs accordingly:

"(b) Engaging in threats and acts of violence against employees or applicants who protest the manner in which the hiring hall is run."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. April 12, 1977

Howard Jenkins, Jr., Member

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[NOTICE OMITTED]

DECISION

Statement of the Case

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard at Los Angeles, California, on June 16, 17 and 18, and July 6, 20, 21 and 22, 1976. The charge and amended charge were filed by Waldo F. Kusterns, an individual, on September 12 and October 18, 1974, respectively. The complaint, amended complaint, erratum, second erratum and amendment to amended complaint issued on February 19, May 14, December 22, and December 23, 1975, and March 9, 1976, respectively, alleging that International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, herein called Respondent or the Union, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended. The complaint was further amended at the hearing.[1]

Issues

The primary issues are:

1. Whether Respondent violated Sections 8(b)(1)(A) and (2) of the Act by:

(a) Since March 12, 1974, failing and refusing to operate its exclusive hiring hall in accordance with contract provisions and by operating its hall in an arbitrary, capricious, and unfair manner.

(b) On and between specific dates, dispatching certain individuals to various employers from its hiring hall without legitimate business reason, and without regard to rela-

[1]The various amendments were incorporated in a single document called "information copy" which was received in evidence as General Counsel's Exhibit No. 2. All references herein to the paragraph numbers of the complaint are keyed to that "information copy."

tive placement of applicants for employment on its "out-of-work" list.

2. If a violation is found, whether Respondent should be ordered to pay backpay to unnamed applicants who should have been but were not referred for employment from the hiring hall.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of the Companies

Respondent has collective-bargaining agreements with a number of associations and individual employers who employ ironworkers. That contract contains an exclusive hiring hall arrangement under which employees are referred from a hiring hall operated by Respondent. The issues in this case relate to Respondent's conduct in operating that hiring hall.

The Associated General Contractors of California, Inc., the Western Steel Council, Inc., and California Iron Workers Employers Council are each associations comprised of various employers and each negotiates collective-bargaining agreements on behalf of their employer-members with various labor organizations including Respondent. Each is a party to a collective-bargaining agreement with Respond-

ent which provides for an exclusive hiring hall.[2] The employer-members of each association are engaged in California as steel erection contractors or general contractors in the building and construction industry and the employer-members of the associations in the aggregate annually purchase and receive goods valued in excess of $50,000 from outside of California. The associations and their respective employer-members are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The following companies are also engaged in the building and construction industry, are bound to a contract with the Respondent which contains the hiring hall provision, and are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act: Binks Manufacturing Company, which has a place of business in California and annually purchases goods valued in excess of $50,000 directly from suppliers outside of California; RPM Erectors, Inc., which has a place of business in California and annually performs services valued in excess of $50,000 for customers outside of California; Rohr-Plessey Corporation, which has a place of business in California and annually purchases goods valued in excess of $50,000 directly from outside of California; Bovee & Crail Construction Co., which has a place of business in California and annually purchases goods valued in excess of $50,000 directly from outside of California; Nemco, Inc. (formerly known as Nichols Engineering and Materials Co.), which has a place of business in Dallas, Texas, and annually purchases

[2]The employer parties to the current contract (G.C. Exh. 13), which runs from June 1, 1974 through June 30, 1977, are various associations and employers, and the union parties are the District Council of Iron Workers of the State of California and Vicinity and Local Unions, including Respondent.

goods valued in excess of $50,000 directly from outside of California and Texas; and Star D Iron, which has a place of business in California and annually purchases goods in excess of $50,000 directly from outside of California.[3]

II. The Labor Organization Involved

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Contract*

At all times material herein, Respondent has been a party to a collective-bargaining agreement with the above-named employers and associations, as well as a number of other employers. That contract provides that the hiring of employers who are employed by contracting employers engaged in field fabrication and/or erection of structural, ornamental, and reinforcing steel work is to be done pursuant to the provisions set forth in Section 5 of the contract. Section 5 provides *inter alia:*

> B—The individual employer shall have the right to employ directly a minimum number of key employees who may include a General Foreman and Foreman. In addition, the individual employer shall have the right to employ directly on any job in the locality in which the individual employer maintains a principal place of business all employees required on such job or jobs provided such employees are regular employees of the individual employer who have been employed by him fifty percent (50%) of the working time of the applicants during the previous twelve (12) months;

[3]The contract relationships between other employers named in the complaint and Respondent are discussed below.

> and, on the jobs of the individual employer located outside of the locality in which he maintains a principal place of business, forty percent (40%) of such employees.
>
> * * * * * * *
>
> C—All other journeymen required by an individual employer shall be furnished and referred to such individual employer through the hiring office of the appropriate Local Union.
>
> * * * * * * *
>
> E—. . . The selection and referral of applicants shall be operated in accordance with the following plan:
>
> Any workman desiring employment in work covered by this Agreement shall be registered in one of the Groups listed below. Each such workman shall be registered in the highest priority Group for which he qualifies.
>
> Group "A"
>
> All applicants for employment who have worked at the trade as journeymen or apprentices in work of the type covered by this Agreement for the past three (3) years in the geographic area covered by this Agreement, provided, however, if such applicants request registration in this Group with the designation of a particular classification or classifications, and specialty or specialties, they shall have worked at least six (6) months within the three (3) years immediately preceding such registration, in such classification or classifications, and specialty or specialties. All apprentices graduating to journeyman status within the coverage of this Agreement shall be included in this Group "A".
>
> Group "B"
>
> All applicants for employment who have worked at the trade as journeymen or apprentices in work of the type covered by this Agreement for the past four (4) years, provided, however, if such applicants request

registration in this Group with the designation of a particular classification or classifications, and specialty or specialties, they shall have worked at least nine (9) months within the four (4) years immediately preceding such registration, in such classification or classifications, and specialty or specialties.

Group "C"

All applicants for employment who have worked at the trade as journeymen or apprentices in work of the type covered by this Agreement for the past two (2) years or more and who have for the past year actually resided within the geographic area covered by this Agreement.

Group "D"

All applicants for employment who have worked at the trade in work of the type covered by this Agreement for one (1) year or more immediately preceding the date of their registration.

Group "E"

All other applicants for employment.

F—Each Local Union shall maintain each of the separate Group lists set forth above which shall list the applicants within each Group in the order of the dates they registered.

G-1—Individual employers shall advise the appropriate Local Union of the number and classification or classifications, and specialty or specialties, of applicants required. The appropriate Local Union shall refer applicants to the individual employer by first referring applicants in Group "A" in the order of their places on said list and then referring applicants in the same manner successively from the list in Group "B", then Group "C", then Group "D", then Group "E".

2—Whenever a Local Union maintains a branch hiring hall, the individual employer shall call the main hiring hall for workmen whenever the branch hiring hall's out-of-work list is exhausted of all workmen who are bona fide residents in the territorial area designated for the branch hiring hall. Workmen shall not be registered on more than one out-of-work list at any one time.

H-1—Any individual desiring employment shall register at the appropriate Local Union by appearing personally and shall indicate his name, address, telephone number, Social Security Account number, classification or classifications, specialty or specialties of the type of work desired, the date of such registration and other pertinent information if required.

2—Available for employment shall mean:

a—All individuals seeking employment under Subsection H-1 above shall be in the Local Union at regularly established Roll Call time.

b—All individuals eligible for referral shall be present at the Local Union during dispatching hours; provided, however, they may be present at a location where they can be reached by telephone if they live in a remote area or, due to extenuating circumstances, cannot be personally present.

3-a—Dispatching hours shall be from 8 a.m. to 10:30 a.m. daily (Saturdays, Sundays and recognized holidays excluded). In emergency cases, workmen may be dispatched other than at dispatching times.

* * * * * * *

4—Upon being referred, each individual shall receive a referral slip to be transmitted to the employer representative at the job site, indicating his name, address, Social Security Account number, type of job,

date of proposed employment, date of referral and rate of pay.

* * * * * * * *

I—The order of referral set forth above shall be followed except in cases where individual employers require and call for applicants possessing special skills and abilities in which case the appropriate Local Union shall refer the first applicants possessing such special skills and abilities in the order they appear on the appropriate register.

J—No provision of this Section shall constitute a limitation on the right of the individual employer to transfer workmen on his payroll from time to time and from place to place at the discretion of the individual employer, providing he secures fifty per cent (50%) of his workmen from the Local Union having jurisdiction.

* * * * * * * *

L—In the event the referral facilities maintained by the appropriate Local Union are unable to fill the requisition of an individual employer for employees within a forty eight (48) hour period after such requisition is made by the individual employer (Saturdays, Sundays and holidays excepted), the individual employer may employ applicants from any source. In such events, the individual employer will notify the appropriate Local Union of the names, addresses, Social Security Account numbers and dates of such hirings. Such notification shall be given promptly but not to exceed twenty four (24) hours after such hiring (Saturdays, Sundays and holidays excepted).

* * * * * * * *

N—In cases where the individual employer hires men in accordance with Section 5-B hereof, the individual employer may hire by name, employees hired from the Local Union and succeeding employees hired by name shall be in the ratio of three (3) for each five (5) employees hired. Such name hiring shall be without regard to the position of the men requested on the registration lists.

* * * * * * * *

B. *The Hiring Hall Procedure as it Should Operate Under the Contract*

Ironworkers in the building and construction industry perform a large variety of tasks requiring different skills. These range from the unloading of certain materials to submarine work which involves underwater welding. A journeyman ironworker generally can perform a number of different types of work but not necessarily all of them. Certain tasks, such as work on high iron beams, require a great deal of physical dexterity while others require highly specialized skills that are attained after extended experience. Ironworkers who use Respondent's hiring hall fill out a self-qualification form in which they indicate what types of work they can or will accept.

When an employer who is bound by the contract needs ironworkers he can, to the limited extent specified in that contract, employ ironworkers who have worked for him previously. The employer must obtain other ironworkers from the hall. When the employer wants ironworkers from the hall, he notifies an agent of Respondent at the hiring hall of his needs and an order is placed for those workers. The order is given to the hiring hall either by phone or by a request delivered at the hall. Sometimes the employer specifically states what type of skills are needed by iron-

workers who are to be sent by the hall and at other times Respondent's business agent at the hall knows what skills are needed through his servicing of the job, and therefore is in a position to make a judgment as to what skills are required. Most orders are placed by employers 1 or 2 days before the ironworkers are needed. The employer can place two types of orders. One is a "by name" order in which the employer requests a specific named ironworker. To the extent that the employer is permitted by the contract to hire certain employees that he has employed previously the hiring hall is supposed to dispatch that named employee. The other is an "open order" in which an ironworker is supposed to be dispatched from an "out-of-work" list.

When an ironworker desires a dispatch from the hiring hall, he goes to the hiring hall and signs an out-of-work list. When he does so, the business agent who is in charge of the hall at the time gives the ironworker an out-of-work number. The hiring hall is open and dispatches ironworkers from 8 a.m. to 10:30 a.m. each weekday except for holidays. Every Monday there is a general roll call of the out-of-work list and the applicants on the out-of-work list who answer the roll call are given new numbers on the out-of-work list based on the number of dispatches that had been made the previous week. As ironworkers with the lowest numbers are dispatched, applicants on the out-of-work list who appear at the hiring hall move down on the list and receive lower numbers. Thus, those on the out-of-work list who keep coming to the hall and are unemployed longest should have the lowest numbers while new applicants have the higher numbers. If an ironworker

accepts a dispatch for a job of a short duration, the contract permits that ironworker to go back on the out-of-work list in his old position. If the number he should have has already been given out, he receives a fractional number between two dispatch numbers so that he can retain his relative position.

Respondent's business agents are in charge of the hiring hall on a rotating basis. When the business agent who is in charge of the hall receives an order for ironworkers from an employer, he calls out the order on a public address system in the hall. He specifies the name of the employer and the type of work that is to be done. The calls are made between 8 and 10:30 a.m. and the applicant for the job must be in the hall when the call is made. There are often as many as 300 applicants, who are on the out-of-work list, physically present at the hall when the calls are made. The largest number of applicants are generally there on Mondays when the roll call is taken, but a substantial number are there whenever the hiring hall is open. When the call is made, anyone with a number can make a bid on the job. The bid with the lowest number receives the job. However, the applicant with the lowest number may decide not to bid on a particular job. The applicant may decide not to bid because he doesn't feel he has the skills to do the job, because the job is located at a greater distance than he desires to travel, because he wants to wait for a job that might be of longer duration, or any one of a number of other reasons. The lowest number bidding on the job is then given a referral or dispatch slip to the job which is signed by the business agent in charge. He then reports for work.

There is no allegation that the hiring hall provisions set forth in the contract or the practice described above is unlawful. It is alleged that Respondent has violated the Act by bypassing the proper hiring hall procedure by filling open orders through the dispatch of employees who were not on the out-of-work list; by dispatching employees "by name" where the employer has placed on open order; and by filling open orders by dispatching employees without announcing the orders at the hiring hall. The parties use the term "backdooring" to refer to any situation where an applicant is referred to a job without the proper hiring hall procedures being followed. The General Counsel contends that large numbers of applicants were unlawfully "backdoored" to employment. Respondent denies that contention.

C. *Insights Into the Actual Working of the Dispatch System*

1. Statements by Union Business Agent Joe Ward

Specific instances of back-door referrals are discussed in detail in sections D through K of this Decision. Various statements and actions of Respondent's business agents must be considered both to shed light on the dispatch system and to put those specific instances of backdooring into perspective.

Joe Ward is a business agent of Respondent. He and the other business agent take turns running the hiring hall and he has often been in charge of the hall. In addition, the business agents, including Ward, service various employers on behalf of Respondent. Ward is an agent of

Respondent. *Carpenters District Council of Denver and Vicinity (Hansel Phelps Const. Co.)*, 222 NLRB No. 86, fn. 2.

In early August 1974, ironworker Howard Johnson was dispatched to the Binks job. On the day of that dispatch, he had a conversation with Ward when Ward was in the dispatch office behind the dispatch cage. When Johnson approached the cage and bid on a job, Ward said "you found out I was going to backdoor the job, didn't you." Johnson replied that he did not doubt it.[4]

On January 29, 1975 Ward was in the dispatch cage of the union office when Howard Johnson, an ironworker who was seeking dispatch, had a conversation with him. Johnson asked Ward about some men that Johnson believed had been backdoored to a job at Standard Oil. Ward said that he didn't have anything to do with it and that Johnson would have to talk to Business Agent Tom Wagner. Johnson asked Ward when Ward was going to stop backdooring the jobs, and Ward replied "I ain't never gonna stop backdooring the jobs as long as I'm an officer of this local union." Johnson asked Ward for the number of the National Labor Relations Board and Ward told Johnson to get out.[5]

On January 26, 1976 Ward announced an order at the hiring hall for a welder for California Blow Pipe. A number of men in the hall shouted "Send Potter back" and

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[4]These findings are based on the credited testimony of Johnson. Ward did not testify.

[5]These findings are based on the credited testimony of Johnson. Lester Zink, an ironworker who was also applying for work, overheard the conversation. His testimony corroborated Johnson's.

Ward said "In no way will I send anybody back to a job that's suing the union."[6]

2. The altercation between Business Agents Ray Kenney and Les Rogers

Les Rogers is president and a business agent of Respondent. Ray Kenney is also one of Respondent's business agents. Both Rogers and Kenney are agents of Respondent.

Respondent held an executive board meeting at the union hall at 8 p.m. on September 25, 1975. Shortly before the meeting began, Rogers told Kenney that Kenney had dispatched two men in Rogers' territory and that he (Rogers) didn't want Kenney ever to interfere with his territory again. Kenney went into the executive board meeting. Shortly thereafter, Rogers came into the room, knocked Kenney down and "stomped" him. Rogers said "I'm going to kill you" and cursed him. Rogers then said "Are you ever going to do that again." Kenney didn't answer and Rogers hit him again.[7] Kenney was then taken to the hospital. Two or three days later, Johnny Caroll called Kenney on the telephone at the hospital and asked him how he felt. Kenney replied that he was paralyzed in his speech and a certain part of his body. Caroll asked him what happened. Kenney replied that a contractor in Rogers' territory called him asking for two men and he filled the order. Caroll asked why Rogers didn't fill it. Kenney answered that it was because Rogers and Tom Wagner (another business agent), were on a week's drunk and he couldn't find them.

[6]This finding is based on the credited testimony of O'Connor.

[7]These findings are based on the credited testimony of Johnny Caroll, who observed the entire incident. Neither Rogers nor Kenney testified.

3. The threats and violence against applicants who questioned the hiring hall procedure

On February 13, 1975 Ward was in charge of the hiring hall. Ward announced a "by name" call for an ironworker named Saunders for a job with Michelle and Pfeffer at the Good Samaritan Hospital. One of the applicants at the hall, Lester Zink, questioned Ward about that referral and Ward replied that Saunders had worked for the company before. Zink said that Ward was a liar and that the man couldn't have worked for the company before because the company hadn't been in town before. Ward replied by calling Zink a trouble-making-son-of-a-bitch and by threatening to pound his head in the pavement.[8]

At about 7:30 a.m. on February 19, 1975 Gilbert C. Sims and a number of other applicants for referral had a conversation in the hiring hall before the dispatch office opened. Business Agent Ward was also present. Sims said that the previous day Business Agent Red Welch had dispatched the son of Business Agent Les Rogers to the post office job in the City of Commerce without announcing that call over the P.A. system. Sims also said that it was an unethical practice and if it continued, sooner or later someone was going to sue the Union. At that point Ward grabbed Sims by the arms, cursed at him, shoved him backwards, and told him to get the hell out of the union hall and stay out. Ward said "You're suing the Local and don't come back." Ward pushed Sims to the floor and Sims landed on his spine, injuring his back. Sims called the police and Ward

[8]These findings are based on the credited testimony of Zink, which was corroborated by the testimony of Gilbert C. Sims, who overheard the conversation.

was arrested. This incident occurred on February 19, 1975 and Sims' doctors did not release him to go back to work until July 1, 1975.[9]

On March 24, 1976, Sims was at the hiring hall.[10] Union Business Agent Thomas Wagner[11] was in the dispatch window at the time and Sims was standing about 8 feet away. Respondent's executive board member Dwayne Duke, together with Pearce Bowers, and Kenny Roberson approached Sims. Bowers said that if Sims was 20 years younger, he (Bowers) would take him out and work him over. Bowers also said that he would grind Sims up, put him in a rendering plant and do away with him. Executive board member Duke said that they had to get rid of all of those s-o-b's and the best thing to do would be to shoot Sims and the rest of the NLRB witnesses. Roberson said that he would help, and that they would get rid of them one way or another. Respondent's business agent, Wagner, listened to those remarks with a smile on his face and didn't say anything. Wagner was in charge of the hall at the time, yet he said nothing when Respondent's executive board member threatened Sims. Whether or not the executive board member was an agent of Respondent, Wagner acquiesced in those threats through his silence.[12]

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[9]These findings are based on the credited and uncontradicted testimony of Sims.

[10]Sims testified that the date was March 24, 1975. However, he referred to that date after testifying to jobs that he bid on in the year before the trial. He also testified that on that date remarks were made about NLRB witnesses. It appears that Sims intended to refer to the year 1976 rather than 1975. In any event, the year is not critical as both dates would be within the Section 10(b) statute of limitations.

[11]Wagner is an agent of Respondent.

[12]These findings are based on the credited and uncontradicted testimony of Sims. Wagner, Duke, Bowers and Roberson did not testify.

4. The removal of Cunningham as steward for Blount

In April 1974, Blount Brothers began work at the bulk mailing center in Bell, California. At that time, Larry Cunningham was the job steward for Respondent at the Blount job. Roger Evans was the Blount supervisor in charge of hiring. Evans notified Cunningham of Blount's need for ironworkers and Cunningham passed the orders on to the hiring hall. Some time near the end of May 1974, Cunningham called Respondent's president and business agent, Les Rogers, about a problem on the job. Rogers responded by asking Cunningham what Cunningham was doing on the job. Rogers said that he wanted his men and his steward. The next day, Rogers came to the jobsite, where he told Cunningham and the other employees that he was very upset and hurt that they were on the job without his knowing. Cunningham replied by saying that he had personally delivered three steward reports to Respondent at the union hall. Rogers said that if there was any hiring to be done on the job, that he was to be notified and that Cunningham was to call him at his home. Cunningham replied that he would do so, but in fact Cunningham never did call Rogers at home.

A few days later Rogers came back to the job and spoke to Cunningham in front of the crew. Rogers said that he saw another man had been hired without his being called but that he didn't care because he knew that the man and Cunningham were friends. Rogers also said that he had to be notified about any more members that were going to be hired.

Later, two more ironworkers were hired through the hiring hall pursuant to orders placed by Cunningham. Rogers

once again came out to the job and spoke to Cunningham in front of the crew. Rogers said that he should have control of the hiring on the job and that he would not tolerate Cunningham's going through the hall without notifying him or calling him at his house.

On December 10, 1974 Evans instructed Cunningham to go to the hiring hall and hire one ironworker on open order and another ironworker, Louis Hall, "by name." Before Cunningham could go to the hall, Rogers came to the jobsite. Rogers asked Evans whether Blount was preparing to hire any ironworkers and Evans told him of the order he was about to place. Evans told Rogers that he was sending Cunningham to the hall to personally put in the order. Rogers told him not to send Cunningham and that he would take care of it. Shortly thereafter, Cunningham went to the hiring hall and placed orders for ironworkers with Business Agent Tom Wagner, who was at the dispatch window. Wagner asked Cunningham if he (Cunningham) knew that he was being relieved as job steward. Cunningham replied that he did not. Cunningham asked whether he could hire the men and Wagner told him that he could not because Rogers was taking care of the hiring.

On December 11, 1974 Charles Morrison come to the job. Rogers told Evans that Morrison was replacing Cunningham as job steward. Rogers also said that when Evans needed men he should tell Morrison; that Morrison would answer to walking Steward Burwick; and that Burwick would report to Rogers. Cunningham, in the presence of Evans, asked Rogers why he was being replaced as steward. Rogers replied that Cunningham wouldn't play ball with

him and wouldn't call him at his home when Blount needed to hire ironworkers.

In mid-January 1975 Rogers came to the jobsite and spoke to Evans. Rogers gave Evans his home phone number and told Evans that when he needed men to call him at his house.[13]

I find that Respondent replaced Cunningham as steward because Cunningham insisted on placing orders with the hiring hall rather than calling Rogers at Rogers' home. Clearly, Rogers was trying to circumvent the hiring hall procedure.

D. *Backdooring to Binks Manufacturing Company*

1. The Van Nuys job

a. *Background*

Binks Manufacturing Company, herein called Binks, was at all times material herein a party to a short-form agreement with Respondent under which the hiring hall provisions of the contract were applicable.

During 1974 Norm Smith was Binks' superintendent at its General Motors jobsite in Van Nuys, California. Smith was responsible for the hiring of ironworkers on that job. When he needed ironworkers he called the hiring hall on the telephone and placed orders for them. On several occasions Smith placed the orders with Respondent's president and business agent, Les Rogers. On other occasions he left the orders with a girl at the hiring hall office. Gen-

[13]These findings are based on the testimony of Evans and Cunningham. Rogers and Morrison did not testify.

erally he called in an order the day before the men were needed. He did not ask for any ironworkers by name and he simply ordered the number of ironworkers that he required.

b. *M. Keaggy and G. Train*

On May 9, 1974 Binks hired M. Keaggy as a foreman and G. Train as an ironworker.[14] As established by the credible testimony of Smith, Binks obtained its ironworkers at the Van Nuys job by placing open orders with the hiring hall shortly before the ironworkers were needed. However, M. Keaggy and G. Train were not dispatched pursuant to any call made at the hiring hall. On May 8 and 9, 1974 no calls for Binks[15] were announced at the hiring hall during dispatch hours. This finding as well as other findings related to what calls were made on particular dates at the hiring hall are based on the testimony of Waldo F. Kusterns. Kusterns, who was physically present at the hall on the dates in question kept extensive records, which were received in evidence, relating to calls that were announced. Kusterns was a fully credible witness. Where Kusterns' testimony and records conflict with the records kept by Respondent, I credit Kusterns.

Respondent's daily dispatch sheet for May 7 and 8, 1974 shows no dispatches for Binks. Those records for May 9, 1974, show that G. Train, who was number 180 on the out-of-work list, was dispatched to Binks on that date. There

[14]This and other findings with regard to hires by Binks at Van Nuys are based on a summary of Binks' hiring records which was introduced in evidence.

[15]Reference to Binks in this portion of the Decision are keyed to the Van Nuys job.

is no mention on that sheet of M. Keaggy.[16] M. Keaggy was not listed on Respondent's out-of-work list for the week beginning with roll call of May 6, 1974, and he therefore was not eligible for any dispatch on an open order pursuant to the hiring hall rules.

The only conclusions that can be drawn from the above facts are that Binks placed an open order for ironworkers at the hall, that Respondent did not call or announce that order during the dispatch hours at the hall, that ironworkers in attendance at the hall therefore never had an opportunity to bid on those jobs, and that Respondent, in disregard of its hiring hall rules, selected and dispatched Train and Keaggy (who was not even on the out-of-work list) to the Binks job. Unlike other similar situations described below, there was no testimony that when they reported for work Train and Keaggy had dispatch slips which had been signed by a business agent. However, in the light of the actions and statements of business agents set forth above, the fact that Binks placed the order with Respondent, the fact that Respondent did not announce the order, and the fact that those employees appeared at the job shortly after the order should have been announced, the inference is warranted that Respondent sent those men to the job. Respondent offered no evidence to rebut that inference. Keaggy and Train were backdoored to the Binks job.

As noted above Keaggy was hired by Binks in a foreman's classification. There was no testimony concerning

[16]Respondent's daily dispatch sheet records as well as its records relating to the out-of-work lists were received into evidence.

his duties as foreman. The title in itself does not establish that he had supervisory duties.[17] The applicants for referral at the hall were all ironworkers. There is no evidence to establish that a dispatch as a foreman would involve supervisory duties. In addition the Board has held that even a refusal to dispatch to a general foreman position could unlawfully interfere with employee rights. In *United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry Local Union No. 137 (Hames Construction)*, 207 NLRB 359, the Board stated:

> In this connection, we note also that not only do the parties hereto consider the job of general foreman to be within the referral provisions of the contract, but we may take official notice that this proceeding arises in the construction industry in which it is well known that individuals may be employed as rank-and-file workers on one job and as supervisors on the next. Therefore, the refusal to refer Sexton might well restrain or coerce him as an employee on some other construction project.

The Board went on to hold that the refusal to refer in that case was one element in a plan that affected other employees and that a violation could be found for that reason as well. In the instant case the improper referral of Keaggy was only one small part of an overall pattern of conduct that affected numerous employees.

c. *J. P. Horan*

On May 10, 1974 Binks hired J. P. Moran as an ironworker after placing an open order for an ironworker at the hiring hall. From May 8 through May 10, 1974, no calls

[17]Ironworker Howard Johnson credibly testified that he was foreman on one job where his duties consisted of unloading pipe.

for Binks were announced at the hall during dispatch hours. Respondent's daily dispatch sheet for May 10[18] showed no dispatch to Binks. Horan was not listed on Respondent's out-of-work list. As with all the other similar situations mentioned herein, Respondent made no attempt to explain why it failed to announce the call during dispatch hours after it had received the open call. As no call was announced after Respondent received an open order and as Horan was not eligible for dispatch because he was not on the out-of-work list, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Horan to the Binks job.

d. *S. Hayes*

On May 13, 1974 Binks hired S. Hayes in a foreman classification after placing an open order at the hiring hall. May 11 and 12, 1974 were Saturday and Sunday, and the hiring hall was not open. On May 13, 1974 there were no calls for Binks announced at the hiring hall during dispatch hours; the daily dispatch sheet showed no dispatches to Binks; and Hayes was not on the out-of-work list. As no calls were announced after Respondent received an open order and as Hayes was not eligible for dispatch because he was not on the out-of-work list, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Hayes to the Binks job.

e. *H. Cavinder*

On May 15, 1974 Binks hired H. Cavinder in a foreman category after placing an open order with Respondent.

[18]As indicated above, the sheet for May 9 showed the dispatch of Train.

On May 14 and 15, 1974 there were no calls announced for Binks at the hiring hall during dispatch hours; the daily dispatch sheets showed no dispatches to Binks; and H. Cavinder was not on the out-of-work list.[19] As no calls were announced after Respondent received an open order and as H. Cavinder was not eligible for dispatch because he was not on the out-of-work list, he was dispatched in violation of the hiring hall procedure. Respondent backdoored H. Cavinder to the Binks job.

f. *J. Deavers and M. LaPolla*

On June 10, 1974 Binks hired J. Deavers and M. LaPolla as ironworkers after placing an open order with Respondent. From June 5 through 10, 1974 (June 8 and 9 were Saturday and Sunday), there were no calls announced for Binks at the hiring hall during dispatch hours, and the daily dispatch sheets showed no dispatches to Binks. Deavers and LaPolla were on the out-of-work list with numbers 132 and 156, respectively. As no calls were announced after Respondent received an open order, Deavers and LaPolla were dispatched in violation of the hiring hall procedure. Respondent backdoored Deavers and LaPolla to the Binks job.

g. *G. Crow*

On June 19, 1974 Binks hired G. Crow as an ironworker, and J. Devine as a welder after placing an open order with Respondent. The daily dispatch sheet for June 19 showed that on that day Devine was dispatched under an open

[19]Binks also hired a journeyman apprentice on May 15, 1974. However, the General Counsel does not contend that there were any violations of the Act relating to apprentices. In this and the other situations below, the order for and dispatch of apprentices need not be considered.

order and Crow was dispatched "by name." Devine was number 44 and Crow was number 67 on the out-of-work list. Respondent's business agent, Tom Wagner, was in charge of the hiring hall that day. Wagner announced one open order and one "by name" order for Binks. As is shown by the daily dispatch sheet, for the "by name" order he called Crow. Binks had placed an open order for two men. When Rogers called for Crow "by name," Rogers circumvented the right of the applicants at the hall to bid for that job and in so doing he backdoored Crow to the Binks job.

h. *D. Currie*

On June 20, 1974 Binks hired D. Currie as an ironworker after placing an open order with Respondent. On June 17 and 18, 1974 there were no calls for Binks announced during dispatch hours at the hiring hall. The only calls for Binks announced on June 19 are those described above. On June 20, 1974 there were no calls announced for Binks at the hiring hall during dispatch hours; the daily dispatch sheets showed no dispatches to Binks; and Currie was not on the out-of-work list. As the open order was not announced and as Currie was not eligible for dispatch because he was not on the out-of-work list, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Currie to the Binks job.

i. *M. Lucero and T. Moxley*

On June 26, 1974 Binks hired M. Lucero, T. Moxley and T. O'Connor as ironworkers after placing an open order with Respondent. The daily dispatch sheets showed that there were no dispatches to Binks on June 24 or 25, 1976

and that one ironworker, O'Connor (who was number 14 on the out-of-work list) was dispatched to Binks on June 26, 1974. There were no calls announced for Binks at the hiring hall during dispatch hours on June 24 or 25 and one call for an ironworker on June 26, 1974. Lucero was number 285 on the out-of-work list and Moxley was not on the list. As the open orders filled by Lucero and Moxley were not announced, their dispatch was in violation of the hiring hall procedure. The dispatch of Moxley, who was not on the out-of-work list was an additional violation of that procedure. Respondent backdoored Lucero and Moxley to the Binks job.

j. *N. Seiver*

On July 12, 1974 Binks hired N. Seiver as an ironworker after placing an open order with Respondent. From July 9 through July 12, 1974 there were no calls for Binks announced at the hiring hall during dispatch hours; the daily dispatch sheets showed no dispatches to Binks; and Seiver was not on the out-of-work list. As the open order was not announced and as Seiver was not on the out-of-work list, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Seiver to the Binks job.

k. *P. J. Jennings, Sr. and P. J. Jennings, Jr.*

On July 16, 1974 Binks hired P. J. Jennings, Sr. and P. J. Jennings, Jr. as ironworkers after placing an open order with Respondent. From July 13 through July 16, 1974 (July 13 and 14 were Saturday and Sunday) there were no calls announced for Binks at the hiring hall during dispatch hours. The daily dispatch sheet for June 15 showed no dispatches to Binks but that record for July 16,

1974 showed that four employees (Bill Thure, Jerry Thure, Frank Young and Don Day) were dispatched to Binks. Those records showed that either B. Thure or J. Thure was dispatched "by name." Binks' records show that none of those employees were hired on that date. Instead, Binks' records show that Jennings, Sr. and Jr. were hired. Neither of them were on the out-of-work list and therefore neither were eligible for dispatch. Respondent backdoored Jennings, Sr. and Jennings, Jr. to the Binks job.

l. *J. Thure and W. Thure*

On July 17, 1974 Binks hired J. Thure and W. Thure as ironworkers after placing an open order with Respondent. The daily dispatch sheet for July 16, 1974 showed that Bill and Jerry Thure were dispatched to Binks and one of the dispatches was by name. J. Thure had an out-of-work number of 135 and W. Thure was not on the list. No calls were announced for Binks at the hiring hall during dispatch hours on either July 16 or 17, 1974. Binks made no "by name" calls on those dates and it therefore appears that the notation on the daily dispatch sheet for July 16, 1974 relating to the "by name" call was not based on any "by name" order from Binks. As Binks' open order was not announced at the hiring hall, the ironworkers at the hall had no opportunity to bid on it. Respondent backdoored J. Thure and W. Thure to the Binks job.

m. *G. Grove and C. Henry*

On July 18, 1974 Binks hired G. Grove and C. Henry as ironworkers after placing an open order with Respondent. On July 18, 1974[20] there were no calls announced for Binks

[20]As noted above, there were no calls for Binks announced on the preceding days. Where prior days are mentioned in preceding sections of the Decision, they will not be repeated.

at the hiring hall during dispatch hours; the daily dispatch sheet showed no dispatches to Binks; and neither G. Grove nor C. Henry were on the out-of-work list. The open order was not announced and neither G. Grove nor C. Henry were eligible for dispatch because they were not on the out-of-work list. Respondent backdoored G. Grove and C. Henry to the Binks job.

n. *D. Day and F. Young*

On July 19, 1974 Binks hired D. Day and F. Young as ironworkers after placing an open order with Respondent. On July 19, there were no calls announced for Binks at the hiring hall during dispatch hours and the daily dispatch sheet showed no dispatches to Binks. F. Young was on the out-of-work list with number 217½, and Day was not on that list. As the open order was not called, D. Day and F. Young were dispatched in violation of the hiring hall procedure. It was further violated by the dispatch of D. Day, who was not on the out-of-work list. Respondent backdoored D. Day and F. Young to the Binks job.

o. *L. Conver*

On August 26, 1974 Binks hired L. Conver and D. Stickle as ironworkers after placing an open order with Respondent. The daily dispatch sheets from August 23 through August 26, 1974 (August 24 and 25 were Saturday and Sunday) showed no dispatches to Binks. From August 23 through August 25 there were no calls announced for Binks at the hiring hall during dispatch hours, but on August 26 one call for Binks was announced at the hiring hall. That call was answered by D. Stickle who was number 102 on the out-of-work list. There was no call announced

for a second employee for Binks, and Conver's name was not on the out-of-work list. As the open order filled by Conver was not announced and as Conver was not on the out-of-work list, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Conver to the Binks job.

2. The South Gate Job

a. *Background*

From June 13, 1974 through January 1975, H. E. Cavender was general foreman for Binks at the General Motors jobsite in Southgate, California. Cavender was responsible for the hiring of ironworkers on that job. When he needed ironworkers he called the hiring hall, either for a "by name" order or an open order. Sometimes his clerk called the hall when an open order was needed. When he knew of an ironworker who could do the job, he placed a "by name" order for that person, and he tried to keep about a 50-50 ratio of "by name" orders and open orders. He placed his orders the day before the men reported for work. The findings below with regard to which employees were called "by name" are based on his testimony, and the findings with regard to the employees who were actually hired are based on Binks' records.

b. *J. Miller*

On July 1, 1974, Binks at its South Gate job,[21] hired R. Goldsmith as a welder, and J. Hannah and J. Miller as ironworkers after placing orders with Respondent. Goldsmith and Hannah were hired after Binks placed "by

[21]All references to Binks in this portion of the Decision are keyed to the South Gate job.

name" orders for them, while Miller was hired after Binks placed an open order.[22] From June 28 through July 1, 1974 (June 29 and June 30 were Saturday and Sunday) there were no calls announced for Binks at the hiring hall during dispatch hours and the daily dispatch sheets showed no dispatches to Binks. J. Miller was on the June 24 out-of-work list with a number of 153 but not on the July 1 out-of-work list. There is no evidence in the record to establish whether or not the employees called "by name" met the requirements of the contract for previous work experience with the employer, and the General Counsel does not argue in its brief that the "by name" dispatches to Binks were improper. However, there were no open order calls for Binks announced at the hiring hall and Miller was therefore dispatched in violation of the hiring hall procedure. Respondent backdoored Miller to the Binks job.

c. *W. Aker*

On August 12, 1974 Binks hired W. Aker and S. Sanders as welders and R. Robertson as a foreman after placing a "by name" order for Robertson and an open order for two other employees. There were no calls announced for Binks at the hiring hall during dispatch hours on August 9, 1974 (August 10 and 11 were Saturday and Sunday), but on August 12, 1974 a call was announced at the hall for Robertson "by name" and for one welder on an open order.

[22]Cavender testified that he was not certain who he called "by name," but a reading of his testimony in its entirety indicates that he did specifically name those employees he hired "by name." The only other method of hiring used by Binks at the South Gate job was an open order and I find that the hire of those who were not called for "by name" was by open order.

The daily dispatch sheet for August 12 showed the dispatch of Robertson "by name" as a pusher and Sanders as a welder on open order. There was no call announced at the hall for a third employee. However, Aker, who was number 290 on the out-of-work list, was dispatched. As the open order filled by Aker was not called, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Aker to the Binks job.

d. *F. Romero*

On August 26, 1974 Binks hired V. Moss as a welder and F. Romero as an ironworker after placing a "by name" order for Moss and an open order for one more employee with Respondent. From August 23 through August 26, 1974 (August 24 and 25 were Saturday and Sunday) there were no calls announced for Binks (other than a call for the Van Nuys job) at the hiring hall during dispatch hours and the daily dispatch sheets showed no dispatches to Binks. Romero was on the out-of-work list with the number of 185½. As the open order was not called, Romero was dispatched in violation of the hiring hall procedure. Respondent backdoored Romero to the Binks job.

e. *J. F. Dunn*

On September 4, 1974 Binks hired D. S. Duke and J. F. Dunn as welders after placing a "by name" order for Duke and an open order for one other employee with Respondent. From September 2 through September 4, 1974 (September 2 was Labor Day) there were no calls announced for Binks at the hiring hall during dispatch hours and the daily dispatch sheets showed no dispatches to Binks. Dunn was on the out-of-work list with a number of 201. As the

open order filled by Dunn was not called, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Dunn to the Binks job.

f. *R. Kennedy*

On September 9, 1974 Respondent hired R. Kennedy as a welder and W. Rogers as an ironworker after placing a "by name" order for Rogers and an open order for one other employee. From September 6 through September 9, 1974 (September 7 and 8 were Saturday and Sunday) there were no calls announced for Binks at the hiring hall during dispatch hours and the daily dispatch sheets showed no dispatches to Binks. Kennedy was on the out-of-work list with a number of 57. As the open order filled by Kennedy was not called, he was dispatched in violation of the hiring hall procedure. Respondent backdoored Kennedy to the Binks job.

E. *Backdooring to Bethlehem Steel Corporation at its Vernon Mill*

1. Background

At the hearing, Respondent amended its answer to deny, on information and belief, that Bethlehem Steel Corporation, herein called Bethlehem, was a member of an association that had agreed to be bound by the terms of the contract in question. Counsel for Respondent stated on the record that he believed Bethlehem to be a signatory to the International agreement. Respondent admitted other allegations in the complaint that alleged that certain employers were bound by the contract in question because they were parties to the International agreement. In any event, the evidence set forth below amply establishes that

an exclusive hiring hall arrangement between the Union and Bethlehem existed in practice. In such circumstances there is no requirement that the arrangement be embodied in a written contract. See *Plumbers Local Union No. 17 of the United Association of Journeymen, Plumbers and Pipe Fitters of the United States and Canada, AFL-CIO (FSM Mechanical Contractor, Inc.)*, 224 NLRB No. 173 fn. 6; *Local Union No. 174, I.B.T. (Totem Beverages, Inc.)*, 226 NLRB No. 108.

During 1974 and 1975 Richard Crane was superintendent of erection for Bethlehem at its Vernon mill. The erection department performs repair work at the mill. Crane was responsible for all hiring in the erection department. Some of the work was performed by employees of Bethlehem who were transferred to the Vernon mill from other Bethlehem jobsites. All other steelworkers were obtained through placing orders at the hiring hall. In the latter part of June 1974, Crane had a meeting with Union Business Agent Rogers at the jobsite. Crane told Rogers how many men would be needed and what type of work was to be done. Thereafter Crane called the dispatcher at the union hall and placed both "by name" and open orders to fill his needs. Rogers appointed Downs as steward and Downs checked all employees who came on the job to make sure they had referrals. All of those employees brought dispatch slips from the Union. None of the ironworkers hired required special skills except for one, Broughton, who did welding. The findings with regard to hiring set forth below are based on the records of Bethlehem Steel and the findings with regard to whether employees were

hired "by name" or by open order are based on the testimony of Crane.

2. P. E. Prince, D. G. Lowther and H. R. Silman

On July 15, 1974 Bethlehem hired nine ironworkers after placing a "by name" order for five of them (Broughton, Harmon, Kennedy, Pari and Price) and an open order for the other four. The four who were hired after the open order were Prince, Jacobazzi, Lowther and Silman. Kusterns credibly testified and his records show that on July 11, 1974 Union Business Agent Kenney announced a call for Bethlehem for two ironworkers by name and one by open order. In addition he averred that there was the announcement of a call for one welder for Bethlehem at a different location. Bethlehem has jobsites at many different locations and it was not clear from Kusterns' testimony whether the announcement of a call for two "by name" and one by open order ironworkers was keyed to the Vernon mill or some other jobsite. However, Respondent's daily dispatch sheet for July 11, 1974 is sufficiently parallel to the testimony of Kusterns to establish that the call was for the Bethlehem Steel mill. That record indicates that two employees were dispatched "by name" and one by open order on Thursday, July 11, 1974, with a reporting time of 7 a.m. Monday. That "Monday" entry coincides with the Monday, July 15, 1974 hiring date on Bethlehem Steel's records. The daily dispatch sheet shows dispatches for Jacobazzi, Bob Harmon and Max Price. It does not show who filled the open order. The out-of-work lists showed that Prince had number 216, Jacobazzi—349, and Lowther—129. Silman was not on the list.

The General Counsel does not contend in her brief that the five employees dispatched on a "by name" basis to Bethlehem Steel were improperly referred. However, there were open orders for four ironworkers and only one call on open order was announced during dispatch hours on July 11, 1974. Respondent's daily dispatch sheet for that day indicates that two of the three applicants dispatched to Bethlehem Steel were called for "by name." There is no means of telling from that record which of the two were called for by name. As Harmon and Price had been called for "by name" by Bethlehem Steel, it is reasonable to infer that they were the "by name" calls listed on the daily worksheet and that Jacobazzi was the open order. There were no other calls announced for Bethlehem Steel's Vernon mill between July 12 and July 15, 1974 (July 13 and 14 were Saturday and Sunday) nor does Respondent's daily dispatch sheet show any referrals to Bethlehem Steel during that time. There were no calls announced for the open orders filled by Prince, Lowther, and Silman but they, as well as all the other applicants who were hired by Bethlehem Steel, came to the job with dispatch slips. Dispatch slips are signed by Respondent's business agents. As the open orders filled by Prince, Lowther and Silman were not called, they were dispatched in violation of the hiring hall procedure. That procedure was also violated because Silman was dispatched when he was not on the out-of-work list. Respondent backdoored Prince, Lowther and Silman to the Bethlehem Steel job.

3. L. W. Crisp, J. F. Mitchell and W. Sekelik

On July 18, 1974 Bethlehem hired four ironworkers. Three of them, Crisp, Mitchell and Sekelik, were hired

after Bethlehem placed an open order with Respondent. There is a question as to the type of order under which the fourth, D. J. Singleton, was hired. In one part of his testimony Crane averred that Singleton was hired "by name" and in another part he averred that it was an open order. Singleton had come to the job and asked for work. Crane told Singleton to go to the hall, and that if Singleton could get a work order he could go to work. Later Singleton reported back with a dispatch slip and began work. There is no evidence to indicate whether or not Singleton took Crane's remark to mean that Crane wanted him as an individual rather than on an open order, nor is there evidence to indicate whether or not Singleton told the dispatcher that Crane had asked for him by name. Under these circumstances I do not believe that the General Counsel has established that Singleton was hired after an open order or that Singleton was improperly dispatched.

However, there were three open orders for ironworkers and between July 15 and 18, 1974 there were no calls announced for Bethlehem during dispatch hours at the hiring hall. Respondent's daily dispatch sheets for July 12 through July 17, 1974 showed no dispatches to Bethlehem. The daily dispatch sheet for July 18, 1974 showed that John Mitchell, Don Singleton and Bill Crisp were dispatched to Bethlehem.

Mitchell (115 on the out-of-work list), Crisp (who was not on the out-of-work list), and Sekelik (172 on the out-of-work list) were dispatched to Bethlehem to fill the open order without that order having been announced at the hall and therefore without the applicants at the hall having had a chance to bid on it. In addition, Crisp was not eligible

for dispatch because he was not on the out-of-work list. Respondent backdoored Crisp, Mitchell and Sekelik to the Bethlehem job.

4. R. F. Torrence

On July 21, 1974 Bethlehem hired Robertson and Winchester as ironworkers after placing "by name" orders for them. On the same day Bethlehem hired R. F. Torrence after placing an open order for an ironworker. From July 19 through July 21, 1974 (July 20 and 21 were Saturday and Sunday, and apparently these three men were hired on a Sunday) there were no calls announced for Bethlehem at the hiring hall during dispatch hours; the daily dispatch sheet showed no dispatches to Bethlehem Steel; and Torrence was not on the out-of-work list. As the open order was not called, and as Torrence was not eligible for dispatch because he was not on the out-of-work list, his dispatch was in violation of the hiring hall procedure. Respondent backdoored Torrence to the Bethlehem job.

F. *Backdooring to RPM Erectors, Inc.*

1. Background

RPM Erectors, Inc., herein called RPM, is signatory to a collective-bargaining agreement with the International Association of Bridge, Structural and Ornamental Iron Workers, and pursuant to that agreement, RPM has agreed to be bound by the Union's contract which contains the hiring hall provisions.

During 1974 and 1975 RPM was involved in the building of the Long Beach, California city hall. The work began and stopped on a number of dates. Donald McEuen was

general foreman for RPM at the jobsite since August 1974. He was responsible for the hiring of ironworkers. If he knew an individual to be a good worker or if his foreman told him that someone was particularly good at the job, McEuen placed a "by name" order for that individual at the hiring hall. On occasions Respondent's Business Agents Tom Wagner and Joe Ward appeared on the job and McEuen left his order for employees with them. In addition to the "by name" hires, McEuen placed open orders for ironworkers with the hall. When he called in an open order he asked for journeymen ironworkers capable of doing the work needed. He contacted the Union 1 or 2 days before he actually hired employees.

The findings below relating to the hires by RPM are keyed to RPM's records and the findings related to "by name" calls and open order calls are based on the testimony of McEuen. McEuen credibly testified that none of the employees he hired after a "by name" call had worked for RPM during the year immediately preceding their hire. No one from the Union ever asked McEuen whether the employees he had called for "by name" had worked for RPM during the preceding year.

2. E. Suval

On August 20, 1974 RPM hired E. Suval as a welder after placing an open order with Respondent. From August 16 through August 19, 1974 (August 17 and 18 were Saturday and Sunday) there were no calls announced for RPM at the hiring hall during dispatch hours; the daily dispatch sheets showed no dispatches to RPM; and Suval was not on the out-of-work list. As the open order was not called

and as Suval was not on the out-of-work list, his dispatch violated the hiring hall procedure. Respondent backdoored Suval to the RPM job.

3. W. L. Rogers

On November 14, 1974 RPM hired W. L. Rogers as a journeyman ironworker after placing an open order with Respondent. From November 12 through November 14, 1974 there were no calls announced for RPM at the hiring hall during dispatch hours; the daily dispatch sheets showed no dispatches to RPM; and Rogers was not on the out-of-work list. As the open order was not called and as Rogers was not on the out-of-work list his dispatch violated the hiring hall procedure. Respondent backdoored Rogers to the RPM job.

4. S. R. Hudson

On November 18, 1974 RPM hired S. R. Hudson and R. R. Mubi as journeymen ironworkers after placing open orders with Respondent. Though RPM had placed open orders, on November 15, 1974 the business agent in charge of the hiring hall announced a call at the hall for one finisher by name, Ron Hudson, and for one open order for RPM. The open order was filled by Mubi. Hudson was number 152 on the out-of-work list. Respondent's daily dispatch sheet for November 15, 1974 showed that Hudson was called "by name" and Mubi filled the open order. As RPM did not request Hudson "by name," that call should have been open for bidding, but Respondent filled the order with Hudson "by name" on its own authority. Respondent backdoored Hudson to the RPM job.

5. D. Mira

On November 20, 1974 RPM hired Lopez and Mira as journeymen ironworkers after placing with Respondent a "by name" call for Lopez and an open order for one other employee. From November 16 through November 19 (Nov. 16 and 17 were Saturday and Sunday) there were no calls announced for RPM at the hiring hall during dispatch hours and the daily dispatch sheet showed no dispatches to RPM. On November 20, 1974, two "by name" calls were announced for RPM for ironworker finishers. The calls were for Lopez, who was number 80 on the out-of-work list and Mira, who was number 170 on the out-of-work list. The daily dispatch sheet for November 20, 1974 shows that Lopez and Mira were dispatched to RPM "by name." As Mira was dispatched "by name" to fill an open order, the hiring hall bidding procedures were circumvented. Respondent backdoored Mira to the RPM job.

The General Counsel alleges in her brief that Dietz, Glenn, Hardin and Kosut were improperly dispatched to RPM from about March 28 through April 28, 1975.[23] Kusterns did not testify concerning what occurred at the hiring hall on those dates. Raymond Mubi averred that he made notes after visiting the job and after being in the hall. However, his notes are so confused and his recollection of dates was so vague that there is considerable ambiguity with regard to exactly what happened at the hall, and what assumptions he made when he saw employees on the job. I am unprepared to base a finding that Respondent backdoored employees to that job on his testimony.

[23]J. M. Lopez, J. Renteria, R. Marrs, E. Coulter, H. Coulter and E. Saunders were hired after RPM placed orders for them "by name."

G. *Backdooring to C F Braun and Co.*

1. Background

C F Braun and Co., herein called Braun, has at all times material herein been a party to an International agreement with the International Association of Bridge, Structural and Ornamental Iron Workers.[24] Prior to December 31, 1974 Braun was also a member of AGC. In addition, the evidence set forth below establishes that at all times material herein an exclusive hiring hall arrangement between the Union and Braun existed in practice.

In 1964 and 1965 Braun was involved in construction work at the Standard Oil refinery in El Segundo, California. Braun's office manager, Constantine Lekas, was responsible for the hiring of ironworkers on that job. Braun's supervisors told Lekas of their employee needs and Lekas called the Union's hiring hall for ironworkers. He usually called Business Agent Wagner at the hall. On occasions when Wagner was on a job, Lekas placed orders with him directly. Some of the orders were "by name" and others on open order. When employees reported for work they brought dispatch slips from the Union with them. The findings below relating to the call date, hire date and type of order as well as the employees hired are based on the records of Braun.

[24]That agreement provides, *inter alia:*

G. Hiring of Men. The employer agrees to employ Journeymen in any territory where work is being performed or to be performed in accordance with the Referral plan in force and effect in the jurisdiction of the Local Union where such work is being performed . . . Any referral plan . . . other than the Referral plan annexed hereto and operated on a local level . . . shall apply in such local area.

2. J. E. Haile

On October 16, 1974 Braun placed an open order for an ironworker with Respondent and on October 17 Braun hired J. E. Haile. Haile as well as all other hires brought dispatch slips from the Union. On October 16 and 17 there were no calls announced for Braun at the hiring hall during dispatch hours and the daily dispatch sheets showed no dispatch to Braun. Haile was on the out-of-work list with number 100. Braun placed an open order, there was no call announced pursuant to that order, and Haile was sent to the job with a dispatch slip. Respondent backdoored Haile to the Braun job.

3. R. W. Shepard

On October 22, 1974 Braun placed an open order with Respondent for three employees in ironworker or welder classifications. In addition, a fourth order was placed for a welder but that welder did not report for work and Braun's records do not show whether the order was "by name" or not. On October 23 Braun hired Brady, Seifert and Finley. Also on October 23, Braun placed four open orders for employees in ironworker classifications. On October 24, Braun hired Demetz, Shepard, Aduddell and Whalin. There were no calls announced at the hiring hall during dispatch hours on October 22, 1974, but on October 23 a call was announced for Braun for two certified welders and four ironworkers. It thus appears that the Braun open orders were filled by seven employees and only six open orders were announced at the hall. The daily dispatch sheet for October 23, 1974 showed two separate dispatches to Braun. The first showed the dispatch of J. Seifert and L. Finley as welders on open order. The second showed the

dispatch of Aduddell, Demetz and Whalin as ironworkers on open order and Bob Shepard "by name." Brady had an out-of-work number of 177¼, which was much higher than the other applicants who were dispatched. However, that in itself is insufficient to establish that Brady was backdoored. Though Braun made no "by name" orders on the dates in question, Respondent's daily dispatch sheet shows that Shepard was dispatched "by name." Respondent backdoored Shepard to the Braun job.

4. E. Suval and C. L. Edwards

On October 29, 1974 Braun placed an open order with Respondent for four employees in ironworker and welder classifications. On October 30 Braun hired Suval, Edwards, Dean and Salazar. There were no calls announced at the hiring hall during dispatch hours on October 29, 1974, but on October 30 there were two calls announced for Braun, one for an ironworker and one for a welder. Respondent's daily dispatch sheet for October 30, 1974 showed that Dean and Salazar were dispatched to Braun. It thus appears that the two open orders that were announced at the hall were filled by those men. The other two open orders, which were filled by E. Suval (who was not on the out-of-work list) and Edwards (who was number 236 on that list), were not announced at the hiring hall. As the open orders filled by Suval and Edwards were not called, their dispatch was in violation of the hiring hall procedure. Respondent backdoored Suval and Edwards to the Braun job.

5. J. McBee

On November 1, 1974 Braun placed an open order with Respondent for one ironworker and on November 4 Braun

hired J. McBee. On November 1, 1974 there was only one call announced at the hiring hall for Braun. That call was "by name" for McBee, who was number 10 on the out-of-work list. The daily dispatch sheet for November 1 shows that McBee was dispatched to Braun "by name." Though Braun had placed an open order, Respondent called McBee "by name" and therefore denied applicants the opportunity to bid on that job. Respondent backdoored McBee to the Braun job.

6. J. F. Dunn, J. Pompa and L. C. Gleason

On November 5, 1974 Braun placed open orders for one foreman and for four other employees in ironworker or welder classifications. On November 6, Braun hired J. F. Dunn, J. Pompa, S. Pittman, R. L. Thure and L. C. Gleason (foreman). On November 5, 1974 a call was announced for Braun at the hall during dispatch hours for one connector (ironworker), and one welder. The daily dispatch sheet for November 5 showed that R. Thure and S. Pittman were dispatched on open order and that Dunn (who was number 117 on the out-of-work list) was dispatched "by name." On November 6, there were no calls announced for Braun and the daily dispatch sheet showed no dispatches to Braun. Braun had ordered five employees on open order. Two of those open orders were filed by R. L. Thure and S. Pittman after two jobs had been announced at the hall. The remaining three openings were not announced. They were filled through the dispatch of Gleason (number 53 on the out-of-work list), Pompa (who was not on the out-of-work list) and J. F. Dunn (who was number 117 on the out-of-work list). Dunn was called "by name" even though Braun had placed an open order. As Dunn was called "by name" to

fill an open order, as Pompa was dispatched when he was not on the out-of-work list, and as the open orders filled by Dunn, Pompa and Gleason were not announced at the hiring hall, their dispatch was in violation of the hiring hall procedure. Respondent backdoored Dunn, Pompa and Gleason to the Braun job.

7. R. A. Wolf, F. Romero, A. Puckett, D. J. Singleton, F. P. Bergsma and M. Carroll

On November 8, 1974 Braun placed an open order with Respondent for six employees in ironworker and welder classifications. On November 11, 1974 Braun hired Wolf, Romero, Puckett, Singleton, Bergsma and Carroll. As with all of Braun's new hires these employees had dispatch slips from Respondent. From November 8 through November 11, 1974 there were no calls announced for Braun at the hiring hall through dispatch hours and the daily dispatch sheets showed no dispatches to Braun. Romero was not on the out-of-work list and the other applicants all had high numbers (Wolf 112, Puckett 26[illegible], Bergsma 136½, Singleton 213 and Carroll 61). As there was no call on the open orders and as Romero was not on the out-of-work list, the dispatches violated the hiring hall procedure. Respondent backdoored all six of those employees to Braun.

8. L. J. Singleton and R. A. Denk

On December 3, 1974 Braun placed an open order with Respondent for six workers (five in ironworker classifications and one foreman). On December 4, 1974 Braun hired six employees including L. J. Singleton and R. A. Denk (foreman). There was no testimony concerning what occurred at the hiring hall on December 3 or December 4,

1974, but the daily dispatch sheet for December 4, 1974 showed that all of the people hired had been dispatched from the hall. That record also showed that Bob Denk and L. J. Singleton were dispatched "by name." Neither of those two employees was on the out-of-work list. Respondent circumvented the hiring hall procedure both by filling an open order with a "by name" call and by dispatching employees who were not on the out-of-work list. Respondent backdoored Singleton and Denk to the Braun job.

9. D. E. Ferris, J. W. Peters, J. A. Heath, W. O. Wagner, V. C. Moss and K. A. Engberg

On December 5, 1974 Braun placed open orders with Respondent for eight ironworkers. On December 6, Braun hired Bridgeman, Ferris, Peters, Heath, Wagner, Moss, Wash, and Engberg. There was no testimony concerning what occurred at the hiring hall on December 5 or 6, 1974, but the daily dispatch sheet for December 5 showed that Bridgeman and Walsh were dispatched to Braun on open order, and that Peterson and Vern Moos [sic] were dispatched "by name." There is no record of any other dispatches on that date. It appears that two of the open orders were filled by Bridgeman and Walsh. It also appears that the "Pete Peterson" and "Vern Moos" listed in the daily dispatch sheet are misspellings for Peters and Moss, who were hired by Braun. The daily dispatch sheet shows that they were dispatched "by name," but Braun had placed an open order. In addition neither Peters nor Moss were on the out-of-work list. The filling of open orders with "by name" calls and the dispatch of applicants who were not on the out-of-work list, violated the hiring hall procedure. Respondent backdoored Peters and Moss to the Braun job.

Two of the other employees who were dispatched by Respondent and hired by Braun were not on the out-of-work list. They were Ferris and Engberg. Respondent backdoored Ferris and Engberg to the Braun job.

Heath and Wagner were also dispatched by Respondent and hired by Braun. Heath was 186 and Wagner was 230 on the out-of-work list. The high numbers alone are not sufficient to establish that those two employees were backdoored. However those high numbers must be viewed in connection with the fact that the daily dispatch sheet in question did not show the dispatch of those two employees. An inference is warranted that Heath and Engberg were not dispatched through the hiring hall's normal procedure. Respondent backdoored Heath and Wagner to the Braun job.

10. L. F. LaLonde, D. J. Dryden and B. J. Nichols

On December 6, 1974 Braun placed open orders with the Respondent for five employees in ironworkers classifications and in addition for one foreman. On December 10, 1974 Braun hired employees, who had been dispatched by Respondent, to fill those positions. There was no testimony concerning what occurred at the hiring hall. Three of the positions were filled by L. F. LaLonde, D. J. Dryden and B. J. Nichols (foreman). The daily dispatch sheet for December 9 showed the dispatch of LaLonde but did not show a dispatch for Dryden or Nichols. None of the three were on the out-of-work list. As they were not on that list, Respondent circumvented the hiring hall procedure when it dispatched them to work. Respondent backdoored LaLonde, Dryden and Nichols to the Braun job.

11. V. L. Tyson

On December 10, 1974 Braun placed with Respondent one "by name" order for D. J. Jewell and one open order for a welder. On December 11, Braun hired Jewell and V. L. Tyson. There was no testimony concerning what occurred at the hiring hall on December 10 and 11, and the daily dispatch sheets showed no dispatches to Braun on those dates. As Tyson was not on the out-of-work list, he was not eligible for dispatch on an open order. Respondent backdoored Tyson to the Braun job.

12. P. Salas

On January 20, 1975 Braun placed with Respondent a "by name" order for R. E. Austrum and an open order for an ironworker. On January 21, 1975 Braun hired Austrum and on January 22 Braun hired P. Salas (whose number on the out-of-work list was 77). As with all other ironworkers hired by Braun, Salas had a dispatch slip and therefore had been referred by Respondent. From January 20 through January 22, 1975 there were no calls announced for Braun at the hiring hall during dispatch hours, and the daily dispatch sheets showed no dispatches to Braun. No other applicants had a chance to bid on that open order because Salas was dispatched without any announcement of that order at the hall. Respondent backdoored Salas to the Braun job.

13. J. J. Gasper

On February 19, 1975 Braun placed with Respondent "by name" orders for Miller and Morris, and an open order for one additional ironworker.[25] On February 20 Braun

[25]In addition Braun placed an open order for one more employee, but Braun's records were blank as to the filling of that order.

hired Miller and Morris on the "by name" order and hired J. J. Gasper (number 196½ on the out-of-work list) to fill the open order. On February 19 and 20, 1975 there were no calls announced for Braun at the hiring hall during dispatch hours and the daily dispatch sheets showed no dispatches to Braun. As the open order filled by Gasper was not called, his dispatch violated the hiring hall procedure. Respondent backdoored Gasper to the Braun job.

14. L. E. Haney

On March 11, 1975 Braun placed with Respondent an open order for six ironworkers.[26] On March 13, 1975 Braun hired Cline, Farney, Hayse, Johnson, Haney and Roy. On March 11 and 13, 1975 there were no calls announced for Braun at the hiring hall during dispatch hours, but on March 12 there were open orders announced for Braun for five welders. The daily dispatch sheet does not show the dispatch of L. E. Haney but does show the dispatch of the other five employees who were hired by Braun. In addition that record shows one apprentice and one callback, and lists the names of Wake, Bridgeman and Haile, none of whom were hired by Braun except for Wake who was an apprentice. Braun's open order was for six ironworkers but there were only five open orders announced at the hall. The five that were announced were filled by Cline, Farney, Hayse, Johnson and Roy. The sixth open order was filled by L. E. Haney, who was number 250 on the out-of-work list, even though that order was not announced at the hall. Respondent backdoored Haney to the Braun job.

[26]In addition Braun placed a seventh open order for an ironworker, but Braun's records show that that seventh order was not filled.

H. *Backdooring to Michel and Pfeffer*

1. Background

The complaint alleges that Michel and Pfeffer, herein called M and P, was bound by the Union's contract through membership in an association. Respondent's answer denies that allegation of the complaint. However, the evidence set forth below amply establishes that M and P is an employer engaged in the construction industry and that an exclusive hiring hall arrangement between the Union and M and P existed in practice.

For 10 months beginning about June 6, 1975 Allen Wilson was general foreman for M and P at the Good Samaritan Hospital jobsite in Los Angeles. As general foreman, Wilson hired ironworkers for the job. He placed both "by name" orders and open orders with the hiring hall to fill his needs. His practice was to call the hall and to place the order with the business agent in charge of the hall. Except for one employee, Wilson did not know whether the people hired had worked for M and P previously. He testified that he did not think that all of the employees hired had dispatch slips. Wilson placed orders for the employees he needed a few days before they were hired. The findings set forth below relating to the employees hired and the types of orders placed with Respondent are based on the testimony of Wilson and on M and P records.

2. F. Burkhardt

On November 4, 1974 M and P hired F. Burkhardt as a finisher after placing an open order with Respondent. On November 4, a "by name" order for F. Burkhardt was

announced for M and P at the hiring hall. The daily dispatch sheet for that date showed that Burkhardt, who was listed on that sheet as number 2, was dispatched to M and P. Burkhardt was 152 on the out-of-work list. Burkhardt was called "by name" at the hall to fill an open order and therefore the other applicants at the hall had no opportunity to bid on that job. Respondent backdoored Burkhardt to the M and P job.

3. R. R. Gayeska and K. A. Waigand

On December 13, 1974 M and P hired R. R. Gayeska and K. A. Waigand as finishers after placing an open order with Respondent. There was no testimony concerning what occurred at the hiring hall from December 10 through December 13. The daily dispatch sheets for those dates showed no dispatches for M and P. However, neither Gayeska nor Waigand were on the out-of-work list and therefore they were not eligible for dispatch. Respondent backdoored Gayeska and Waigand to the M and P job.

4. J. J. Ferguson

On March 21, 1975 M and P hired J. J. Ferguson and E. D. Hoyt as ironworkers after placing with Respondent a "by name" order for Hoyt and an open order for one additional ironworker. On March 19 and 20, 1975 there were no calls announced at the hiring hall during dispatch hours for M and P, and the daily dispatch sheets showed no dispatches to M and P. On March 21, open orders were announced for Braun for two finishers. That call was filled by Zink and Thure. However, the daily dispatch sheet showed that the reporting time for that job was Monday, March 24, 1975 and M and P's records show that those

two employees were hired on that date. The M and P jobs that were filled on March 21, 1975 by Ferguson and Hoyt were not announced at the hiring hall. Hoyt had been called "by name," but Ferguson (who was number 111 on the out-of-work list) filled an open order that was not announced at the hall. Respondent backdoored Ferguson to the M and P job.

I. *Backdooring to Blount Brothers*

1. Background

The complaint alleges that Blount Brothers, herein called Blount, is bound by the Union's contract through membership in AGC. Respondent denies that allegation. However, the evidence set forth below establishes that an exclusive hiring hall arrangement between the Union and Blount existed in practice.

From April 1974 through April 1975 Blount was the general contractor in charge of a bulk mailing center job in Bell, California. Roger Evans was a foreman through December 1974 and a general foreman from January 1975 on that job for Blount. Evans, together with Blount's Superintendent Beesing, hired ironworkers for the job. They filled their needs by instructing the union steward on the job to contact the hiring hall for men. Some orders were "by name" and others were on open order. When the job began, a number of ironworkers were transferred from other Blount jobs. Orders were placed with Respondent a few days before the employees were hired. The findings below with regard to hires and the type of orders that were placed are based on the testimony of Evans and Blount records.

2. C. H. Morrison

On December 10, 1974 Evans instructed Union Steward Cunningham to go to the hiring hall and hire one ironworker on open order and one ironworker Louis Hall, by name. Before Cunningham had a chance to go to the hall, Union Business Agent Les Rogers came to the jobsite and asked Evans about Blount's hiring needs. Evans told him of the two orders he intended to make and Rogers said that he would take care of it. Hall, who had been requested by name, was hired the same day. C. H. Morrison was hired on the following day, December 11, 1974. The daily dispatch sheet showed that Morrison was dispatched as "change of steward," rather than a routine open order call. On December 11, Rogers notified Evans that Morrison was replacing Cunningham as steward. As is set forth in detail in section C 4 of this Decision, Rogers replaced Cunningham with Morrison as steward because Cunningham consistently refused to assist Rogers in backdooring employees to Blount. The Union may have had the right to appoint or replace stewards. However, it could not lawfully circumvent the hiring hall procedures by filling an open order with an appointed steward where that appointment was intended to assist the Union in backdooring other employees. Respondent backdoored Morrison to the Blount job.

3. H. H. Beddingfield

On December 12, 1974 Blount hired H. H. Beddingfield as an ironworker after placing an open order with Respondent.[27] There was no testimony concerning what occurred

[27]Wilson credibly testified that the only "by name" orders that were placed were for Teske and Carbagal.

at the hiring hall on December 12, but the daily dispatch sheet showed that one welder, H. Beddingfield was dispatched to Blount. Beddingfield was not on the out-of-work list and therefore was not eligible for dispatch. Respondent backdoored Beddingfield to the Blount job.

4. G. Usselman

On January 27, 1975 Blount hired R. L. Lord and G. Usselman as ironworkers after placing open orders with Respondent. On January 24, 1975 calls for Blount were announced at the hiring hall for one ironworker "by name" and one on open order. The daily dispatch sheet for that date showed that G. Usselman (who was number 235 on the out-of-work list) was dispatched "by name" and that R. Lord filled the open order. The open order was filled by a "by name" call at the hiring hall. Respondent backdoored Usselman to the Blount job.

J. *Backdooring to Nemco, Inc., Star D Iron, and Bovee & Crail Construction Co.*

1. Background

Nemco, Inc. (formerly Nichols Engineering & Materials Co.) is a signatory to a collective-bargaining agreement with the International Association of Bridge, Structural and Ornamental Iron Workers, pursuant to which it has agreed to be bound by the contract with Respondent. Star D Iron, herein called Star, and Bovee & Crail Construction Co., herein called Bovee, are parties to shortform agreements with the Union. All three use the Respondent's hiring hall.

2. T. O'Connor

Thomas O'Connor was a union steward working for Binks through August 23, 1974. On August 26, 1974 he called Union Business Agent Les Rogers on the telephone. Rogers asked him whether he wanted a job with Nemco at the Pacific Design Center. He replied that he did. O'Connor met with Rogers at a restaurant where Rogers gave O'Connor a referral to the Nemco job as a welder. By circumventing the hiring hall procedure Respondent backdoored O'Connor to the Nemco job.

3. G. Sims

At about 3:30 p.m. on September 2, 1974, in the rear office room of the union hall, Gilbert C. Sims had a conversation with Union Business Agent Tom Wagner. Sims told Wagner that he needed a job and Wagner asked whether Sims wanted to go to work the next day. When Sims replied in the affirmative, Wagner wrote Sims a work order for the Star job. Sims reported for work the following day. Respondent backdoored Sims to the Star job.

By October 13, 1974 Sims was again out of work. At about 10 p.m. on October 13 Union Business Agent Joe Ward called at Sims' home. Ward told him to report the next day to Bovee at the Orange County water desalting plant. Sims began work for Bovee on October 14, 1974. Respondent backdoored Sims to the Bovee job.

K. *Recapitulation of Individuals Backdoored to Jobs*
(all dates in 1974 unless otherwise specified)

	Binks (Van Nuys)	Date Job Began
1.	M. Keaggy	May 9
2.	G. Train	May 9
3.	J. P. Horan	May 10
4.	S. Hayes	May 13
5.	H. Cavinder	May 15
6.	J. Deavers	June 10
7.	M. LaPolla	June 10
8.	G. Crow	June 19
9.	D. Currie	June 20
10.	M. Lucero	June 26
11.	T. Moxley	June 26
12.	N. Seiver	July 12
13.	P. J. Jennings, Sr.	July 16
14.	P. J. Jennings, Jr.	July 16
15.	J. Thure	July 17
16.	W. Thure	July 17
17.	G. Grove	July 18
18.	C. Henry	July 18
19.	D. Day	July 19
20.	F. Young	July 19
21.	L. Conver	August 26
	Binks (South Gate)	
22.	J. Miller	July 1
23.	W. Aker	August 12
24.	F. Romero	August 26
25.	J. F. Dunn	September 4
26.	R. Kennedy	September 9
	Bethlehem	
27.	P. E. Prince	July 15
28.	D. G. Lowther	July 15
29.	H. R. Silman	July 15
30.	L. W. Crisp	July 18
31.	J. F. Mitchell	July 18
32.	W. Sekelik	July 18
33.	R. F. Torrence	July 21
	RPM	
34.	E. Suval	August 20
35.	W. L. Rogers	November 14
36.	S. R. Hudson	November 18
37.	D. Mira	November 20

	C F Braun	Date Job Began
38.	J. E. Haile	October 17
39.	R. W. Shepard	October 24
40.	E. Suval	October 30
41.	C. L. Edwards	October 30
42.	J. McBee	November 4
43.	J. F. Dunn	November 6
44.	J. Pompa	November 6
45.	L. C. Gleason	November 6
46.	R. A. Wolf	November 11
47.	F. Romero	November 11
48.	A. Puckett	November 11
49.	D. J. Singleton	November 11
50.	F. P. Bergsma	November 11
51.	M. Carroll	November 11
52.	L. J. Singleton	December 4
53.	R. A. Denk	December 4
54.	D. E. Ferris	December 6
55.	J. W. Peters	December 6
56.	J. A. Heath	December 6
57.	W. O. Wagner	December 6
58.	V. C. Moss	December 6
59.	K. A. Engberg	December 6
60.	L. F. LaLonde	December 10
61.	D. J. Dryden	December 10
62.	B. J. Nichols	December 10
63.	V. L. Tyson	December 11
64.	P. Salas	January 22, 1975
65.	J. J. Gasper	February 20, 1975
66.	L. E. Haney	March 13, 1975
	Michael and Pfeffer	
67.	F. Burkhardt	November 4
68.	R. R. Gayeska	December 13
69.	K. A. Waigand	December 13
70.	J. J. Ferguson	March 21, 1975
	Blount	
71.	C. H. Morrison	December 11
72.	H. H. Beddingfield	December 12
73.	G. Usselman	January 27, 1975
	Nemco	
74.	T. O'Connor	August 26
	Star D	
75.	G. Sims	September 3
	Bovee	
76.	G. Sims	October 14

L. *Analysis and Conclusions*

Respondent has a collective-bargaining contract with a number of associations and employers in the construction industry. By the terms of that contract, Respondent has undertaken to dispatch employees in various ironworker classifications for employment with employers. The procedures to be followed in such dispatches are set forth in detail in the contract. Pursuant to established practice, the Union has undertaken to apply the hiring hall provisions to various other employers who are not signatories to the contract.

The General Counsel has established by a preponderance of the credible evidence that Respondent dispatched 76 individuals to various jobs in complete and utter disregard of the contractual hiring hall procedure.[28] In all of those situations, the employers had placed orders with the hiring hall for employees and Respondent backdoored the employees by circumventing the hiring hall procedures. In some situations, Respondent dispatched individuals who were not eligible for dispatch because they were not on the out-of-work list. In other situations, Respondents filled open orders by announcing calls "by name," thus preventing applicants on the out-of-work list from bidding on those jobs. In other situations, Respondent dispatched employees after receiving open orders without announcing those orders at the hall, thus completely bypassing the entire hiring hall procedure. Respondent dispatched employees by giving them referral slips at places outside of the hiring hall, without notifying applicants at the hiring

[28]The names of those individuals are set forth in section K of this Decision.

hall of the availability of those jobs. The instances of backdooring were not isolated and, as indicated by the statements and actions of the business agents as is set forth above, were not keyed to particular emergency situations. They were so massive in scale as to substantially undermine the hiring hall procedure and to substitute the business agents' clandestine desires for the objective criteria set forth in the contract.[29]

Respondent's business agents were quite open with regard to their practice of backdooring employees and some of them engaged in threats and violent activity to protect that practice. In early August 1974 Business Agent Ward acknowledged to Johnson that he (Ward) was backdooring employees when he said to Johnson, "you found out I was going to backdoor the job, didn't you?" On January 26, 1976 Ward told a number of employees, "In no way will I send anybody back to a job that's suing the Union." On September 25, 1975, Respondent's president and business agent, Rogers, violently assaulted Business Agent Kenney because Kenney had dispatched two men in Rogers' territory. Kenney was hospitalized with serious injuries. On December 11, 1974 Rogers replaced Cunningham with Morrison as steward on the Blount job because Cunningham refused to help Rogers in circumventing the

[29]RPM hired Lopez, Renteria, Marrs, E. Coulter, H. Counter and Saunders, after placing orders with Respondent for those employees "by name." None of those employees had worked for RPM during the year immediately preceding their hire and therefore they did not meet the contract criteria for "by name" calls. However, the General Counsel's brief does not name any of those employees in its list of those who were improperly referred. There is no testimony that Respondent knew that those employees were ineligible for dispatch, nor is there any evidence that similar dispatches were made to other employers.

hiring hall procedure. On February 13, 1975 when Zink questioned Business Agent Ward about a referral that Zink thought improper, Ward threatened to pound Zink's head in the pavement. On February 19, 1975 when Sims spoke about Respondent's backdooring of employees, Business Agent Ward assaulted Sims and pushed him to the floor. Sims was seriously injured. On March 24, 1976 Respondent's executive board member Duke and two other individuals at the hall threatened to injure or kill Sims. Duke said that they had to get rid of all the s-o-b's and the best thing to do would be to shoot Sims and the rest of the NLRB witnesses. Respondent's Business Agent Wagner listened to the threats with a smile on his face and said nothing.

Considering the statements and actions of Respondent's business agents, together with the 76 specified incidents of backdooring documented by the General Counsel, it is apparent that Respondent's business agents divided Respondent's jurisdiction into fiefdoms from which they dispensed patronage. Some of the business agents engaged in violence and threats of violence to enforce their practice of backdooring employees. The actions of the business agents were such as to give applicants for employment a reasonable basis for believing that access to employment depended on securing the good will of the business agents rather than on the objective criteria of the hiring hall.

The complaint does not allege that the hiring hall provisions set forth in the contract are illegal. Indeed, the same or similar hiring hall provisions have been found by the Board to be lawful. *International Association of Bridge, Structural and Ornamental Iron Workers, Local*

118, AFL-CIO (Bostrom-Bergen), 219 NLRB 467. The fact that the very existence of the hiring hall encourages union membership does not make the hiring hall invalid. As the United States Supreme Court held in *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. 667 (1961):

> The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But as we said in *Radio Officers v. Labor Board* [347 U.S. 17] the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."

In conformity with the Supreme Court's decision, the Board has evaluated hiring halls in terms of whether or not the union's actions are necessary for the effective performance of its function as bargaining representative. Thus, in *International Union of Operating Engineers, Local 18, AFL-CIO (Murphy)*, 204 NLRB 681, remanded 496 F.2d 1308 (C.A. 6, 1974), reaffirmed 220 NLRB No. 29, the Board held:

> When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer —or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power.[3] But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the

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[3] *Radio Officer's Union [A.H. Bull Steamship Co.] v. N.L.R.B.*, 347 U.S. 17 (1954).

> effective performance of its function of representing its constituency.

For a violation to be made out, there is no need for evidence that the Union induced any employer to refuse employment. As the Board held in *Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.)*, 223 NLRB No. 223:

> The Board has consistently found a violation of both Section 8(b)(1)(A) and Section 8(b)(2) of the Act where a union has discriminatorily refused to refer an employee for employment pursuant to the terms of an exclusive referral system in effect between the union and an employer.

In the instant case, Respondent has not operated its hiring hall in a way that was necessary for the effective performance of its function of representing employees. Instead, its actions stood "as a warning to employees that the favor and goodwill of responsible union officials is to be nurtured and sustained." *International Longshoremen's Association, Local No. 1581, AFL-CIO (Guerra)*, 196 NLRB 1186, enf. 489 F.2d 635 (C.A. 5, 1974).

The General Counsel has established that 76 employees were backdoored to jobs in violation of the hiring hall procedures. There is no evidence in the record to establish which particular employees would have been dispatched to those 76 jobs if Respondent had refrained from engaging in backdooring and had followed the criteria set forth in the contractual hiring hall procedure. Though not identified, there were many applicants for employment who were on the out-of-work list, were present at the hall, and were eligible for dispatch under the hiring hall procedures.

Those applicants who would have been referred for work but for Respondent's circumvention of the hiring hall procedure are discriminatees. That is so even though they are not specifically identified in the complaint. As the Board held in *Standard Fruit and Steamship Company*, 211 NLRB 121:[30]

> Although there is no evidence in the instant case that any employee who would have normally been dispatched to work for Respondent Employer was denied such employment as a result of Respondent [Union's] unlawful preferential treatment of certain employees, this is a matter that affects the scope of the remedy, rather than the nature of the violation.

Respondent owes a duty of fair representation to employees in the bargaining unit. That duty extends to applicants for employment through Respondent's hiring hall. *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, AGC)*, 226 NLRB No. 91.

The duty of fair representation was first enunciated by the United States Supreme Court in *Steele v. Louisville and Nashville Railroad Company*, 323 U.S. 192 (1944), which arose under the Railway Labor Act. In that case, which involved racial discrimination, the Supreme Court held that the same statute that gave the union the right to act as exclusive bargaining agent, inherently required the union to represent nonunion or minority members in the craft fairly, impartially and in good faith. In *Ford*

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[30]See also *Bechtel Power Corporation*, 223 NLRB No. 131 (slip decision at page 21); *Utility and Industrial Construction Company and Local 1076, International Laborers Union of North America, AFL-CIO*, 214 NLRB 1053.

Motor Co. v. Huffman, 345 U.S. 330 (1953), the United States Supreme Court applied the same doctrine where a seniority question was raised that involved a union whose status as exclusive representative derived from the National Labor Relations Act. The Court pointed out that "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." See also *Humphrey v. Moore*, 375 U.S. 335 (1965). Though the Supreme Court cases cited above held that unions have a duty to represent fairly all the employees for whom they bargain, none of them dealt specifically with the question of whether a breach of that duty violated any of the unfair labor practice sections of the Act. The Board addressed itself to that question in *Miranda Fuel Company, Inc.*, 140 NLRB 181, enforcement denied, 326 F.2d 172 (C.A. 2, 1963). In that case, the Board found that a union caused an employee's seniority status to be reduced in a manner that violated its collective-bargaining contract. The Board held that the duty of a statutory representative to represent all employees in a bargaining unit had to be viewed in the context of the right guaranteed employees in Section 7 of the Act to bargain collectively, through representatives of their own choosing. The Board then held:

> . . . Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on the statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations,

> when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair.

The Board further held that a union violates Section 8(b)(2) of the Act where its failure to represent employees fairly adversely affects the employment status of an employee, saying:

> We further conclude that a statutory bargaining representative and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee.

In essence the Board held that where a union causes an employer to adversely affect an employee's employment status in such a manner that no legitimate employer or union purpose is served, that the foreseeable result is an unlawful encouragement of union membership. In the Board's words:

> As we read *Local 357*, the Supreme Court did not overrule its holding in *Radio Officers* that union membership is encouraged or discouraged whenever a union causes an employer to affect an individual's employment status. What it does hold, in our opinion, is that an 8(a)(3) or 8(b)(2) violation does not necessarily flow from conduct which has the foreseeable result of encouraging union membership, but that given such "foreseeable result" the finding of a violation may turn upon an evaluation of the disputed conduct "in terms of legitimate employer or union purposes." Unlike our

> colleagues, we do not interpret the Court's opinion as permitting unions and their agents an open season to affect an employee's employment status for any reason at all—personal, arbitrary, unfair, capricious, and the like—merely because the moving consideration does not involve the specific union membership or activities of the affected employee. [Footnote omitted]

Though the Court of Appeals for the Second Circuit refused to enforce the *Miranda* decision, a majority of that Court did not rule on the question whether a breach of the duty of fair representation was an unfair labor practice. In *Vaca v. Sipes,* 386 U.S. 171 (1967), the United States Supreme Court decided a preemption question involving a state court's jurisdiction over a union's allegedly arbitrary failure to process a grievance to arbitration. The high Court found that the state court had concurrent jurisdiction but that a failure to represent fairly had not been proven. In reaching that conclusion the Court reviewed the history of the *Miranda* doctrine in detail, tying that doctrine to the flow of cases dealing with the duty of fair representation which started under the Railway Labor Act. The Court held at page 181: ". . . when the Board declared in *Miranda Fuel* that a union's breach of duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts." In *Kaj Kling v. N.L.R.B.,* 503 F.2d 1044 (C.A. 9, 1975), the Court in referring to *Miranda* stated: "Though enforcement was denied by the Second Circuit . . . , the Board's *Miranda Fuel* doctrine appears to have won the day, as shown by the later favorable quotations in *Vaca v. Sipes,* 386 U.S.

171 at 177. . . ." The Board has consistently followed its *Miranda* doctrine.[31]

On the basis of the facts set forth above, I find that Respondent operated its hiring hall in such a manner as to deny applicants their right to fair representation.

Respondent argues that the issues presented in this case should be resolved through arbitration. Section 5 M of Respondent's contract provides:

> In the event any job applicant is dissatisfied with his Group Classification or his order of referral in that such applicant claims he was not placed in the proper Group set forth above or is aggrieved by the operation of the hiring arrangement or the provisions of this Section, such aggrieved job applicant may appeal in writing within 10 (ten) days from the day on which his complaint arose to an Appellate Tribunal consisting of a representative selected by the Employers and a representative selected by the Union and an impartial Umpire appointed jointly by the Employers and the Union, and the decision of the Appellate Tribunal shall be final and binding.

In *International Association of Bridge, Structural and Ornamental Iron Workers, Local 118, AFL-CIO (Bostrom-Bergen),* 219 NLRB 467, the Board ruled on the same contract clause. The Administrative Law Judge in that case held that the aggrieved party was opposed to the position of the Union, and there was no assurance that representatives of the employers or the union, who together with an impartial umpire, composed the Appellate Tribunal whose

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[31]E.g. *Delaware Valley Printing and Graphic Communications Union, Local 1776 (Carlettini),* 226 NLRB No. 58; *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, AGC),* 226 NLRB No. 91.

decision was final and binding, would fairly represent the aggrieved party in his grievance against the union's administration of the hiring hall. The Board agreed with the Administrative Law Judge that the issue should not be deferred to arbitration under the *Collyer* doctrine, 192 NLRB 837, noting that the union was represented on the tribunal but that the employees were not. In addition, deferral to arbitration is inappropriate where the interests of the aggrieved employee are in apparent conflict with the interests of the parties to the contract. *Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.),* 223 NLRB No. 223. In the instant case, the interests of the discriminatees who were deprived of referral from the hall are in clear conflict with the interests of the Union. The employers have taken no action to protect the discriminatees.

In sum, I find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by operating its exclusive hiring hall in disregard of the provisions of the collective-bargaining contract; by the backdooring of the 76 individuals named in section K of this Decision, and by failing to dispatch 76 unnamed individuals who should have been dispatched pursuant to the contractual hiring hall procedure instead of those who were backdoored.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, as set forth in section III, above, occurring in connection with the business operations of the employers set forth in section I above, have a close, intimate and substantial relationship to trade, traffic and

commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to operate its exclusive hiring hall in a nondiscriminatory manner and in accordance with the provisions of its July 1, 1974 collective-bargaining agreement with various associations and employers, or any successor agreement.

The General Counsel seeks an order that will make whole any individuals denied dispatch by Respondent's unlawful operation of its hiring hall. Respondent contends that a backpay order would not be appropriate.

The General Counsel has established that 76 named individuals were dispatched in violation of the contractual hiring hall procedures. The 76 discriminatees who would have been dispatched to those jobs but for Respondent's unlawful conduct, were not named or identified.

In some cases, the Board has ordered backpay for unidentified discriminatees and in other cases it has refused to do so. *International Longshoremen's and Warehousemen's Union, Local No. 13 (Gatlin),* 183 NLRB 221, remanded, ... F.2d ....., (C.A. 9, 1972), 80 LRRM 3213, order reaffirmed 210 NLRB 952, was a case in which individuals

were denied Class A status in a referral system because of an unlawful sponsorship system. The number of discriminatees and their names were unknown. The Administrative Law Judge held that any attempt to supply the names and the number of the discriminatees would be pure conjecture. The Board did not provide for a backpay order.

In *Local 851, International Longshoremen's Association, AFL-CIO (Biggers),* 194 NLRB 1027, the Administrative Law Judge recommended backpay for the charging parties and all other applicants for employment who had suffered loss by reason of a union's unlawful operation of a hiring hall. The Board did not grant a backpay order covering the other applicants, holding that it would be inadvisable to extend a "make whole" remedy "to include losses of earnings to unknown individuals who were not named in the complaint and whose status as a part of a group which was unlawfully deprived of work was not litigated during the course of the hearing."

However, in *Internationa' Longshoremen's and Warehousemen's Union, Local No. 13 (Pacific Maritime Association),* 192 NLRB 260, reaffirmed 210 NLRB 952, the Board ordered backpay for unidentified individuals who had lost employment opportunities because of the unlawful dispatch of other applicants.

In *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 101 (Stearns-Roger Corporation),* 206 NLRB 30, the Board granted a backpay order for unidentified individuals who were discriminated against when a union gave preference in dispatch to members. The Board held:

> Nothing in this Decision precludes the General Counsel from establishing in the compliance portion of this proceeding that there are additional individuals whom Respondent has caused discrimination against and who are entitled to a remedy under the terms of this Order.

Wayne Electric Inc., 226 NLRB No. 59, was a case involving a violation by an employer rather than a union. However, it involved unidentified discriminatees. The Board held:

> . . . if there are employees who would have been referred but for Respondent's misconduct the make-whole order herein encompasses them, and . . . a determination as to whether or not there are such employees is best left to the compliance stage of this proceeding.

The Board is understandably reluctant to allow extended, open ended litigation concerning the existence of possible discriminatees, in a backpay hearing. However, in the instant case, that problem is somewhat limited. There were 76 specific instances where named employees were unlawfully dispatched. Thus, there are 76 particular jobs in question. It may be that the General Counsel will be unable to identify which employees would have filled those jobs if the contractual hiring hall procedures had been followed. The General Counsel will have to show that those individuals were on the out-of-work list, were in the hiring hall when the job should have been announced, and met the other criteria for proper dispatch as is set forth in the contract. However, I believe that the General Counsel should have the opportunity to attempt to do so in a backpay proceeding. A wrong cognizable under the Act has been

established. Seventy-six individuals have been discriminated against. To the extent that they have lost earnings and benefits because of that discrimination, they should be made whole.

I recommend that Respondent be ordered to make whole for any loss of earnings and benefits they suffered, those 76 employees who were entitled to dispatch from Respondent's hiring hall pursuant to the contractual rules of that hiring hall, but who were denied dispatch because of the unlawful referral to jobs of the 76 individuals named in section III K of this Decision. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest at 6 percent as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

As Respondent's unfair labor practices are serious in nature and strike at the very heart of the Act, I recommend that Respondent be ordered to cease and desist from in any manner restraining or coercing employees or applicants for employment in the exercise of rights guaranteed to them in Section 7 of the Act.[52]

It is recommended that Respondent be ordered to maintain a book or semi-permanent type of record to reflect accurately, fairly, and nondiscriminatorily, the operation of the referral system from the hiring hall, and for a period of 1 year, disclose to the Regional Director for Region 21 or his agents the manner of operation of the hiring hall.[53]

[52] *Local No. 78, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Murray Walter, Inc.)*, 223 NLRB No. 104; *Local Union No. 77 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (Colorite, Inc.)*, 222 NLRB No. 95.

[53] *International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO (Considine Distributing Co.)*, 166 NLRB 915.

It is further recommended that the Respondent be ordered to preserve, and upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall and all records relevant and necessary for compliance with this recommended Order.

Conclusions of Law

1. The above-named associations and employers are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, Respondent has been a party to a collective-bargaining agreement dated July 1, 1974 with various associations and employers, under which Respondent operates an exclusive hiring hall. The criteria for dispatch from that hall are set forth in that contract.

4. Respondent violated Section 8(b)(1)(A) and (2) of the Act by:

(a) Operating its exclusive hiring hall in disregard of the provisions of said collective-bargaining agreement.

(b) Dispatching the 76 individuals named in Section III K of this Decision in violation of the contractual hiring hall procedures.

(c) Failing to dispatch 76 unnamed individuals who should have been dispatched pursuant to the contractual hiring hall procedures instead of those who were unlawfully dispatched.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[34]

ORDER

The Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Operating its exclusive hiring hall in disregard of the provisions of its July 1, 1974 collective-bargaining agreement with various associations and employers, or any successor agreement.

(b) Dispatching any individual in violation of said contractual hiring hall procedures.

(c) Failing to dispatch any individual who is entitled to dispatch pursuant to said contractual hiring hall procedures.

(d) In any manner restraining or coercing employees or applicants for employment in the exercise of rights guaranteed to them in Section 7 of the Act.

[34]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Operate its exclusive hiring hall in a nondiscriminatory manner and in accordance with the provisions of its July 1, 1974 collective-bargaining agreement with various associations and employers, or any successor agreement.

(b) Make whole those individuals who were unlawfully refused dispatch, for any loss of earnings and benefits they suffered, in the manner set forth in the section of this Decision entitled, "The Remedy."

(c) Maintain a book or semi-permanent type of record to reflect accurately, fairly and nondiscriminatorily, the operation of the referral system from the hiring hall, and for a period of 1 year disclose to the Regional Director for Region 21 or his agents the manner of operation of the hiring hall.

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall, and all records relevant and necessary for compliance with this Order.

(e) Post at its business offices, hiring hall and meeting places, copies of the attached notice marked "Appendix."[35] Copies of said notice on forms provided by the Re-

[35]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

gional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: December 29, 1976

RICHARD D. TAPLITZ

Richard D. Taplitz
Administrative Law Judge

[NOTICE OMITTED]

Appendix C

United States Court of Appeals
For the Ninth Circuit

[Filed September 26, 1979]

National Labor Relations Board, Petitioner, v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 433, Respondent.	No. 77-2653

JUDGMENT

Before: Wallace and Tang, Circuit Judges, and Whelan*, District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board to enforce its order dated April 12, 1977, directed against Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local 433, its officers, agents, and representatives. The Court heard argument of respective counsel on January 9, 1979, and has considered the briefs and transcript of record filed in this cause. On July 16, 1979, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

*The Honorable Francis C. Whelan, Senior District Judge for the Central District of California, sitting by designation.

ORDERED AND ADJUDGED by the Court that Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Operating its exclusive hiring hall in disregard of the provisions of its July 1, 1974, collective-bargaining agreement with various associations and employers, or any successor agreement.

(b) Engaging in threats and acts of violence against employees or applicants who protest the manner in which the hiring hall is run.

(c) Dispatching any individual in violation of said contractual hiring hall procedures.

(d) Failing to dispatch any individual who is entitled to dispatch pursuant to said contractual hiring hall procedures.

(e) In any manner restraining or coercing employees or applicants for employment in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Board (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Operate its exclusive hiring hall in a nondiscriminatory manner and in accordance with the provisions of its July 1, 1974 collective-bargaining agreement with various associations and employers, or any successor agreement.

(b) Make whole those individuals who were unlawfully refused dispatch, for any loss of earnings and benefits they suffered, in the manner set forth in the "Remedy" section of the Administrative Law Judge's Decision (attached hereto as Appendix A). [Omitted]

(c) Maintain a book or semi-permanent type of record to reflect accurately, fairly and nondiscriminatorily, the operation of the referral system from the hiring hall, and for a period of 1 year disclose to the Regional Director for Region 21 or his agents the manner of operation of the hiring hall.

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall, and all records relevant and necessary for compliance with this Order.

(e) Post at its business offices, hiring hall and meeting places, copies of the notice attached to this judgment as Appendix B. Copies of said notice on forms provided by the Regional Director for Region 21, (Los Angeles, California), after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced or covered by any other material.

(f) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this judgment, what steps

Respondent has taken to comply herewith. Costs in this court favor the petitioner and against the respondent.

28 copies of petitioner's opening brief	$133.34
28 copies of petitioner's reply	198.24
Records Reproduction	78.50
	$410.08

Endorsed, Judgment Filed and Entered:

SO ORDERED:
JUDGES:

/a/ Emil E. Melfi
Emil E. Melfi
Clerk/

/s/ J. CLIFFORD WALLACE
J. Clifford Wallace,
Circuit Judge

/A TRUE COPY

ATTEST:

Emil E. Melfi

/s/ THOMAS TANG
Thomas Tang,
Circuit Judge

/s/ FRANCIS C. WHELAN
Francis C. Whelan,
District Judge

A TRUE COPY
ATTEST 1-OCT 1979

EMIL E. MELFI, JR.
Clerk of Court

By: OSCAR TAGLE
Oscar Tagle, Deputy

[Seal]

Supreme Court, U. S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-984

In the Supreme Court of the United States

OCTOBER TERM, 1979

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-984

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL 433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19) is reported at 600 F.2d 770. The decision and order of the National Labor Relations Board (Pet. App. B-1 to B-80) are reported at 228 N.L.R.B. 1420.

JURISDICTION

The judgment of the court of appeals (Pet. App. C-1 to C-4) was entered on September 26, 1979. The petition for a writ of certiorari was filed on December 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and 158 (b)(2), by arbitrarily dispatching employees from its exclusive hiring hall to 76 jobs in disregard of its collective-bargaining agreement with various employers.

2. Whether the Board properly found that the Union violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by engaging in threats and acts of violence against employees or applicants for referral who protested the Union's unlawful operation of the hiring hall.

3. Whether the Board properly left for the compliance proceeding the determination of the identities of the discriminatees, where no individual discriminatee was identified at the unfair labor practice hearing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. 2-3.

STATEMENT

Petitioner ("the Union") has collective bargaining agreements with a number of multi-employer associations and individual employers who hire ironworkers (Pet. App. B-6 to B-8). The master contract to which they have agreed provides that ironworkers are to be hired according to Section 5 of the contract, which sets forth procedures for the distribution of available jobs (*id.* at B-8 to B-13). Employers are entitled to fill a certain proportion of their available jobs with ironworkers who have previously worked for them and whom they request by name through the Union hall; other jobs must be filled through "open orders" (*id.* at B-13 to B-14). When the procedure is properly followed, the Union's business agents call out each employer's order for ironworkers on a public address system at the hall (*id.* at B-13 to B-16). When an open order call is made, an applicant may bid on the job if he has a number on the out-of-work list maintained at the hall. The bid with the lowest number receives the job (*id.* at B-15).

From May of 1974 to March of 1975, the Union, in 76 instances, dispatched employees without adhering to the referral procedure set forth in the contract (Pet. App. B-23 to B-61). The improper dispatches —known as "backdooring" (*id.* at B-16)—took several forms: the Union agents dispatched individuals who were not on the out-of-work list; they filled open order calls as if the persons dispatched had been requested "by name" (thus preventing out-of-work list appli-

cants from bidding), and they dispatched employees without announcing the call orders at the hall, again, preventing eligible applicants from bidding (*id.* at B-16, B-23 to B-61).

The Union's business agents openly acknowledged the backdoor policy, and they engaged in threats and violence against applicants who questioned it (Pet. App. B-16 to B-23). For example, on February 13, 1975, applicant Lester Zink questioned Business Agent Joe Ward about a job referral. After a short discussion, Ward called Zink "a troublemaking son-of-a-bitch" and threatened to pound his head into the pavement (*id.* at B-19). A few days later, on February 19, 1975, applicant Gilbert C. Sims, in a conversation with Ward about the hiring hall, stated that someone would sue the Union if the backdoor practices continued. Ward cursed Sims and ordered him out of the hall, exclaiming "You're suing the Local and don't come back." He then pushed Sims to the floor, injuring Sims' back. Sims called the police and Ward was arrested (*id.* at B-19 to B-20). Approximately a year later, Sims was approached at the hiring hall by Business Agent Thomas Wagner, Executive Board Member Dwayne Duke, and two other ironworkers. One of the ironworkers told Sims that, if Sims were 20 years younger, the ironworker would "grind Sims up, put him in a rendering plant and do away with him." Duke added that they "had to get rid of all of those s-o-b's and the best thing to do would be to shoot Sims and the rest of the NLRB witnesses." Business Agent Wagner, who was in charge of the hall, listened

to the remarks with a smile and said nothing (*id.* at B-20).

2. The Board adopted the Administrative Law Judge's decision, which held that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by operating its hiring hall in such a manner "as to deny applicants their right to fair representation" (Pet. App. B-71). The Administrative Law Judge found that the statements and actions of the Union's business agents, together with the 76 incidents of backdooring, were likely to give applicants for employment "a reasonable basis for believing that access to employment depended on securing the good will of the business agents rather than on the objective criteria of the hiring hall" and they "stood as a warning" to employees that such good will must be "nurtured and sustained" (*id.* at B-64, B-66). The Administrative Law Judge concluded that, by operating a hiring hall in this manner, with no legitimate employer or union purpose being served, the Union breached its duty of fair representation, citing *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963); *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667 (1961); and *Vaca* v. *Sipes*, 386 U.S. 171, 181 (1967) (Pet. App. B-62 to B-71).

The Board affirmed that finding and further found that "[a]lthough the threats and the act of violence [pertaining to applicants Zink and Sims] were not specifically alleged in the complaint to violate the Act, they are closely related to and indicative of the manner in which the hiring hall was operated and, there-

fore, fall within the general allegations of the complaint that [the Union] violated the Act by operating its hiring hall in an arbitrary, capricious, and unfair manner" (Pet. App. B-3).

The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practices found, to operate its exclusive hiring hall in a nondiscriminatory manner and in accordance with the provisions of its collective-bargaining agreement, and to make whole any individuals denied dispatch by the Union's unlawful operation of its hiring hall (Pet. App. B-3, B-73 to B-80). In fashioning the backpay portion of the remedial order, the Board adopted the Administrative Law Judge's conclusion that, although the individuals denied referrals were not as yet identified, the General Counsel should have the opportunity to identify the discriminatees at the backpay hearing (*id.* at B-1, B-73 to B-76).

3. The court of appeals sustained the Board's findings and conclusions, and enforced its order. The court agreed that "the natural and foreseeable consequences of a system by which the Union's agents arbitrarily dispensed their patronage was to encourage loyalty of the job applicants to the Union," and that by "openly backdooring referrals in violation of the agreement" and threatening and committing violence against applicants who objected, the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act (Pet. App. A-11 to A-12). The court also agreed that the Union violated Section 8(b)(1)(A) of the Act by engaging in threats and acts of violence against

workers opposing the Union's hiring hall practices. The court found that the issue was "fully and fairly litigated" and that "the Board's position that the acts and threats of violence were within the general language of the complaint is reasonable" (Pet. App. A-8 to A-9). Finally, the court agreed that the Board "acted in its discretion" in deferring the issue of the identity of the discriminatees to the post-enforcement compliance proceeding (*id.* at A-13 to A-18).

ARGUMENT

1. The Union offers no justification for its backdooring practices, nor does it deny that its conduct was arbitrary and a breach of its duty of fair representation. Rather, it contends (Pet. 5-6) that, because its backdooring "did not bear any relationship to union participation or non-participation," its conduct could not be found to violate the Act. There is no merit to that contention.

a. As this Court stated in *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967), it has long been recognized that a union has a statutory duty to represent fairly all employees in a bargaining unit "both in its collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement * * *." In *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963), the Board first ruled that a union's breach of its duty of fair representation by arbitrary conduct also constitutes an unfair labor practice under Section 8(b)(1)(A) of the Act, whether or not the union

conduct related directly to the employee's union membership or activities. The Board's *Miranda Fuel* ruling has been expressly adopted by the Fifth, Seventh, Ninth and District of Columbia Circuits,[1] and has been cited with apparent approval by the First and Third Circuits.[2] Moreover, this Court assumed the validity of the *Miranda Fuel* doctrine in *Vaca* v. *Sipes*, *supra*, when it held that a union member's claim of breach of the duty of fair representation in connection with the union's handling of his grievance could be considered judicially even though the conduct might also have been an unfair labor practice within the Board's jurisdiction under *Miranda Fuel*. See also *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 64 (1975).

Although the Second Circuit declined to enforce the Board's order in *Miranda Fuel*, 326 F.2d 172, that decision was issued 17 years ago, before the

[1] *NLRB* v. *International Longshoremen's Ass'n Local 1581*, 489 F.2d 635 (5th Cir.), cert. denied, 419 U.S. 1040 (1974); *Local Union No. 12, United Rubber Workers* v. *NLRB*, 368 F.2d 12, 17 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967); *Kling* v. *NLRB*, 503 F.2d 1044, 1046 (9th Cir. 1975); *Truck Drivers and Helpers Local Union 568* v. *NLRB*, 379 F.2d 137, 141-142 (D.C. Cir. 1967). In *Barton Brands, Ltd.* v. *NLRB*, 529 F.2d 793, 798-800 (7th Cir. 1976), the Seventh Circuit endorsed the view that such arbitrary conduct by a union may violate Section 8(b)(2) of the Act. See pages 9-10, *infra*.

[2] *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 287 (1st Cir.), cert. denied, 400 U.S. 877 (1970); *Bleier* v. *NLRB*, 457 F.2d 871, 872-873 (3d Cir. 1972).

Board's theory gained acceptance in other circuits, and the Second Circuit has never reconsidered the issue. See *NLRB* v. *Local 485, International Union of Electrical Workers*, 454 F.2d 17, 21 n.6 (2d Cir. 1972). Moreover, only one member of the *Miranda Fuel* panel concluded that arbitrary conduct which is in breach of the duty of fair representation does not violate the Act. Chief Judge Lumbard and Judge Friendly found no need to reach the validity of the Board's conclusions concerning Section 8(b)(1)(A) because they disagreed with the Board's factual finding; and Judge Friendly, dissenting, would have sustained the Board's Section 8(b)(2) finding.[3]

b. Moreover, the court of appeals found (Pet. App. A-11 to A-12) that "the natural and foreseeable consequences of [the] system by which the

[3] The cases relied on by the Union (Pet. 7) for the proposition that the Board has shown confusion on this issue do not support that assertion. In *International Union of Operating Engineers Local 18*, 204 N.L.R.B. 681 (1973), remanded 496 F.2d 1308 (6th Cir. 1974), reaff'd, 220 N.L.R.B. 147 (1975), enforcement denied, 555 F.2d 552 (6th Cir. 1977), the issue was whether the union's denial of seniority on a hiring hall list to a member who was disruptive in the hall and at a union meeting was necessary for the effective functioning of the union and therefore permissible. In *Millwrights' Local Union 1102*, 144 N.L.R.B. 798, 801 & n. 4 (1963), the Board cited *Miranda Fuel, supra*, but found that the Union's conduct there was not "guided by arbitrary or irrelevant considerations, inconsistent with its duty to represent all in the bargaining unit fairly." Similarly in *Houston Typographical Union No. 87*, 145 N.L.R.B. 1657, 1664 (1964), the Board found that the Union was not "guilty of unfair representation or invidious discrimination * * * within the meaning of the *Miranda* principle * * *."

Union's agents arbitrarily dispensed their patronage was to encourage loyalty of the job applicants to the Union and its agents." The court's holding that, in such circumstances, "[n]o specific intent to discriminate on the basis of union membership need be shown" to establish a violation of Section 8(b)(2) of the Act is plainly correct. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 44 (1954). This is no reason for further review by this Court.

2. The Board found (Pet. App. B-2 to B-3) that the Union violated Section 8(b)(1)(A) of the Act by engaging in threats and acts of violence against applicants opposing the Union's referral practices. The Union does not object to the finding on substantive grounds, but rather argues (Pet. 9-11) that the finding is based on "background material" and, therefore, "cannot become the basis for a substantive finding of a violation" of the Act. The Administrative Law Judge (Pet. App. B-16 to B-23) used the information pertaining to the Union's threats and acts of violence against workers opposing the Union's referral practices to put "specific instances of backdooring into perspective." The Board, however, concluded (*Id.* at B-3) that, although not specifically alleged in the complaint, the Union's actions "are closely related to and indicative of the manner in which the hiring hall was operated and, therefore, fall within the general allegation of the complaint." The court of appeals agreed. It found that the threats and acts of violence "were as much a part of the unfair operation of the hiring hall as the improper

referral practices" (Pet. App. A-9). It further found (*ibid.*) that "the issue of threats and violence [was] fully and fairly litigated." In such circumstances, as the court of appeals correctly held, the Board properly may find a violation of the Act and issue an appropriate remedial order. *Alexander Dawson, Inc.* v. *NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978).[4]

3. Contrary to the Union (Pet. 9), the Board and the General Counsel did not "concede that it is impossible to identify alleged discriminatees," nor was this an issue that was "decided adversely" to the General Counsel. Rather, the Board found that, although the 76 employees who did not get referrals because of the backdooring were not identified at the hearing, the General Counsel should be afforded an opportunity to do so at the compliance stage. In so holding, the Board noted (Pet. App. B-75) that the problem of identification here was "somewhat limited." The court agreed, observing that (Pet. App. A-16 to A-17) "[t]he Union's out-of-work list will identify the applicants who were eligible for referral when the Union backdoored these

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[4] Accord: *Owens-Corning Fiberglas Corp.* v. *NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969); *Tex Tan Welhausen Co.* v. *NLRB*, 419 F.2d 1265, 1269-1270 (5th Cir. 1969); *NLRB* v. *Scenic Sportswear*, 475 F.2d 1226, 1227 (6th Cir. 1973); *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612, 615-616 (7th Cir. 1970); *NLRB* v. *Thompson Transport Co.*, 421 F.2d 154, 155 (10th Cir. 1970).

NLRB v. *H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962), on which the Union relies (Pet. 11), is not to the contrary. There the court found that the violation was neither "charged in the complaint nor litigated at the hearing."

jobs." The court also noted (Pet. App. A-17) that the Union will be given the opportunity to contest any backpay claim during the compliance proceeding and, if it so desires, upon judicial review of the Board's determination.

This procedure reflects the public policy that workers should be made "whole for losses suffered on account of an unfair labor practice" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)), and, as the court of appeals found (Pet. App. A-17), occasions "no unfairness to the Union." Other circuits have held that the issue of the identification of discriminatees is "properly considered in the compliance stage of the case, after the question of discrimination has been definitively settled." *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612, 616 (7th Cir. 1970); *United Steelworkers of America Local 5571* v. *NLRB*, 401 F.2d 434, 437-438 (D.C. Cir. 1968).[5] And see *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 411 (1960) (Frankfurter, J., concurring). Use of that procedure here was plainly proper and raises no issue warranting consideration by this Court.

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[5] Where the number or identity of the employees discriminated against cannot be identified, the Board will not authorize such a remedy. Compare *International Longshoremen's Union Local No. 13*, 183 N.L.R.B. 221, 229 (1970), remanded, 80 L.R.R.M. 3213 (9th Cir. 1972), order reaff'd, 210 N.L.R.B. 952 (1974) (cited at Pet. 8-9) with *International Longshoremen's Union Local No. 13*, 192 N.L.R.B. 260, 264 (1971), reaff'd, 210 N.L.R.B. 952, 953 (1974), enforced, 549 F.2d 1346, 1355 (9th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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FEBRUARY 1980

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